Supreme Court, U.S.
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No. 00-___

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is an arbitration agreement, contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land boundaries, enforceable by the arbitration proceedings provided for in the agreement?

II. Where the arbitration agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ,

does execution of such an arbitration agreement constitute a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings?

PARTIES TO THE PROCEEDING BELOW

The Petitioner (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

The Respondent (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma. Respondent was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

CORPORATE DISCLOSURE STATEMENT

Petitioner, C&L Enterprises, Inc., is a nongovernmental Corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The unpublished original opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2 (filed November 5, 1996) affirming judgments of the District Court of Oklahoma County, Oklahoma, in favor of Petitioner is reprinted in the Appendix at App. 12. Respondent's Petition to this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721), was granted by this Court on June 1, 1998, and, on the same date, this Court ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This Court's orders are reprinted in the Appendix at App. 8, 9. The unpublished opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, reversing, on remand, the judgments of the District Court of Oklahoma County, Oklahoma (filed February 8, 2000) is reprinted in the Appendix at App. 2. The unpublished Order of the Court of Civil Appeals for the State of Oklahoma, Division 2, (filed March 27, 2000) denying the Petitioner's petition for rehearing is reprinted in the Appendix at App. 10.

BASIS FOR JURISDICTION

Petitioner seeks review of the Oklahoma Court of Appeals decision filed February 8, 2000. Petitioner's timely petition for rehearing was denied by order filed March 27, 2000. Petitioner's timely petition for writ of

certiorari seeking discretionary review by the Oklahoma Supreme Court, being the state court of last resort, was denied May 24, 2000. This Petition is being filed within 90 days after denial of said discretionary review pursuant to U.S. Sup. Ct. Rule 13.1 and jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Okla. Stat. tit. 15 § 802 (West 1993) provides:

> § 802. Application of act – Courts – Jurisdiction
>
> A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.
>
> B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

2. Okla. Stat. tit. 15 § 811 (West 1993) provides:

§ 811. Court to confirm award

Upon application of a party to the agreement, the court shall confirm an award, unless within the time limits imposed herein grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13 of this act.

3. Okla. Stat. tit. 15 § 812 (West 1993) provides:

§ 812. Vacation of award – Grounds

A. Upon application of a party, the court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the

party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators are chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section 4 of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 4 of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

4. Okla. Stat. tit. 15 § 813 (West 1993) provides:

> § 813. Modification or correction of award by court – Grounds
>
> A. Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:
>
> 1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> 2. The award is imperfect in a matter of form, not affecting the merits of the controversy; or
>
> 3. The arbitrators have made an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.
>
> B. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as modified and corrected. Absent any modification or correction, the court shall confirm the award as made.
>
> C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.
>
> D. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of

the proceedings subsequent thereto, and disbursements, may be awarded by the court.

STATEMENT OF THE CASE

On August 25, 1993, Respondent, the Citizen Band Potawatomi Indian Tribe of Oklahoma, ("Potawatomi") presented to Petitioner, C&L Enterprises, Inc., ("C&L") a proposed contract for C&L's construction of the roof upon a bank building on non-reservation, non-trust land owned by Potawatomi (hereafter the "Contract"). Potawatomi's Contract was made upon an American Institute of Architects form agreement chosen by Potawatomi. Potawatomi and/or its architect drafted the contract terms and provisions not set forth in the form. The Contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in any court having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(App. 46, Article 10.8) (emphasis added).

After execution of the Contract, Potawatomi decided to change the type of roof and entered into a contract with another company in breach of the Contract with C&L. Said breach occurred before construction had progressed to the point where any physical roofing work was required and prior to C&L being given a notice to proceed under the Contract. C&L gave notice to the architect and Potawatomi of its damages – lost profits – and its demand for arbitration as provided by the Contract. (App. 34, Article 2.1)

Potawatomi was represented by counsel and repeatedly corresponded to AAA (the American Arbitration Association) setting forth its arguments and claimed authorities regarding the factual issues and arguments alleging sovereign immunity from suit. In the arbitration hearing C&L was required to and did present exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[1]

After conclusion of the arbitration hearing and consideration of the evidence submitted, the arbitrator

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[1] Exhibits "C," "D," "E" and "F" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

rendered its award in favor of C&L in the amount of $25,400.00 plus attorney's fees of $2,230.00, costs of $34.67 and arbitration fees of $750.00. (App. 61).

C&L thereafter brought suit in the District Court of Oklahoma County to confirm the arbitration award consistent with Oklahoma law and the terms of the arbitration agreement. (App. 28).

Potawatomi brought a motion to dismiss the state court action asserting sovereign immunity. C&L responded asserting: that because the Contract between Potawatomi and C&L was executed outside of Indian Country, sovereign immunity never attached; that the terms of the arbitration agreement explicitly waived whatever sovereign suit immunity existed as to the Contract at issue; and that the contract was properly enforceable by arbitration and ultimately in state court.[2] The District Court of Oklahoma County denied Potawatomi's motion to dismiss and denied Potawatomi's subsequent motion to reconsider. (App. 24-26).

Potawatomi failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety (90) days after delivery of a copy of the Award to Potawatomi as required by to 15 Okla. Stat. tit. §§ 812, 813. Thereupon, C&L filed its Motion for Confirmation of Arbitration Award giving Potawatomi notice of the same and the hearing set. Potawatomi chose not to appear or otherwise oppose the motion and the trial

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[2] Objection to Defendant's Motion to Dismiss, pp. 4-10, *C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

Court accordingly entered Judgment confirming the Award as mandated by 15 Okla. Stat. tit. § 811. (App. 21).

Subsequently, pursuant to Oklahoma law, C&L made an original and amended fee application giving notice of the application for fees and hearing date thereon to Potawatomi. Potawatomi failed to appear or otherwise respond to such fee applications. Judgment granting the same was awarded by the Oklahoma County District Court after consideration of the detailed supporting time statements presented by C&L's counsel. (App. 18).

Potawatomi appealed and C&L again raised both the argument that sovereign immunity never attached and that, assuming for argument that sovereign immunity attached, it was expressly waived by the Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts. Without reaching the question of whether the execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996).

Potawatomi petitioned this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721). This Court granted the petition on June 1, 1998 and ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

On remand, the Court of Civil Appeals for the State of Oklahoma, Division 2, addressed the waiver of sovereign immunity issue but nevertheless reversed the judgments of the District Court of Oklahoma County, Oklahoma on February 8, 2000 and denied the C&L's petition for rehearing on March 27, 2000. C&L's petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court was denied May 24, 2000. Mandate has issued but its effectiveness had been suspended pending the resolution of this petition. (App. 11).

REASONS FOR GRANTING THE WRIT

Proposition 1: The Oklahoma Appellate Court Has Decided an Important Federal Question in a Way That Conflicts with Decisions of the Seventh Circuit Court of Appeals, the Eighth Circuit Court of Appeals and Decisions of the State Courts of Last Resort for Alaska and Arizona.

As a matter of federal law, an Indian tribe is subject to suit where it has waived sovereign immunity.[3] Even assuming that the Potawatomi's contract with C&L could otherwise be frustrated by sovereign immunity, any sovereign immunity from suit to enforce the arbitration award was expressly waived by Potawatomi. Therefore, jurisdiction was properly exercised by the Oklahoma State Court pursuant to the provisions of the Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. §§ 801-818.

[3] *Id.* at 754, 118 S.Ct. at 1702.

The Oklahoma Court of Civil Appeals declined to enforce the arbitration agreement contrary to the opinions of other state and federal courts consistently finding such agreements waive sovereign immunity.

The contract at issue, an American Institute of Architects form agreement, was prepared and proposed by Potawatomi and the contract terms and provisions not set forth in the form were drafted by Potawatomi and its architect. The contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in **any court** having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(App. 46, Article 10.8) (emphasis added).

Among the courts which have specifically considered arbitration agreements such as the agreement between Petitioner and C&L, in the context of claims of sovereign immunity, the outcomes have been consistent and contrary to the ruling of the Oklahoma Court of Civil Appeals. In *Native Village of Eyak v. GC Contractors,* 658 P.2d 756 (Alaska 1983), the agreement between the parties

contained an arbitration clause with terms virtually identical to the clause at issue herein providing that the agreement:

> . . . shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 758.

Interpreting the effect the arbitration clause the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc. v. Superior Court,* 703 P.2d 502 (Ariz.App. 1985), *cert. denied,* 474 U.S. 920, 106 S.Ct. 250

(1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the Tribe was generally entitled to sovereign immunity. Likewise, the court acknowledged that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Id.* at 508.

On this foundation, the court considered an arbitration clause contained in the contract between the parties. Again, the substantive provisions of the clause considered are virtually identical to the provisions of the clause at issue herein. The agreement provided:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id.

The *Val/Del* court cited with approval both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated that:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, **after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity . . . Having expressly waived its sovereign immunity, civil**

> **jurisdiction would properly lie with the State of Arizona . . .**

Val/Del, at 509. (emphasis added).

In both *Val/Del* and *Native Village of Eyak v. GC Contractors*, state supreme courts have considered arbitration clauses in contracts with Indian tribes otherwise possessing sovereign immunity. The clauses in these cases were virtually identical to the arbitration agreement herein and were clearly no more explicit or unequivocal in waiving sovereign immunity. In both cases, the courts specifically found the arbitration agreements to be the "clear" "unequivocal" and "express" waiver of immunity which the Potawatomi argue is required.

The Supreme Court of Alaska subsequently reviewed the ruling of *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (cited below by Potawatomi) as well as its prior ruling in *Eyak*, in the case of *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992). The court assumed arguendo that the Appellant CO-OP was entitled to tribal sovereign immunity based upon its historical tribal status. The court went on to state that the CO-OP waived sovereign immunity from suit by entering into an arbitration agreement. *Id.* at 754.

Then, addressing *Pan American* the court distinguished it from *Eyak* as follows:

> Unlike *Native Village of Eyak, Pan American* did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, *Pan*

> *American* directly attacked the tribe's authority to regulate affairs on its reservation.

Id.

The *Hydaburg* court discussed for comparison situations involving foreign sovereigns. The court cited the Restatement of the Foreign Relations Law of the United States:

> [A]n agreement to arbitrate is a waiver of immunity from jurisdiction in
>
> (i) an action or other proceeding to compel arbitration pursuant to the agreement; and
>
> (ii) an action to enforce an arbitral award rendered pursuant to the agreement; . . .

1 Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b) (1987) (quoted in *Hydaburg*, at 754).

The court then proceeded to set forth a number of authorities applying this principal to arbitration agreements with foreign sovereigns. Acknowledging that federal courts have explicitly held that Indian tribes are not foreign states, the *Hydaburg* court stated that:

> Nevertheless, the rationale of the cases relating to waiver of immunity by foreign sovereigns is equally applicable to waiver of sovereign immunity by Indian tribes.

Id.

The Potawatomi argue that a specific waiver must somehow recite the magic words of "waiver," "Indian" and "immunity" and that absent such an incantation, waiver can only be inferred. No authority whatsoever is

cited for this proposition by the Potawatomi and, indeed, none of the authorities cited by either party supports such a restrictive and mechanical view. As defined by *Black's Law Dictionary*, 1417 (rev. 5th ed. 1979), "Express Waiver" is simply "[t]he voluntary, intentional relinquishment of a known right."

Clearly, the arbitration agreement proposed by Potawatomi and agreed to by both parties constitutes a voluntary, intentional relinquishment of any sovereign immunity from suit to enforce the arbitration agreement or arbitration award.

Despite Potawatomi's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that "**judgment may be entered upon**" the arbitration award and that the arbitration agreement "**shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**" The arbitration clause is clearly an express waiver of immunity by the Potawatomi as was correctly determined by the Oklahoma County District Court.

More recent cases directly on point have echoed the analysis and findings of the authorities discussed above. Indeed, recent authorities are even clearer that language essentially identical to or even less explicit than the arbitration agreement at issue herein does constitute an explicit waiver of sovereign immunity from suit.

In *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of

sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not even contain the specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also applicable to the case at bar) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

Id. at 562.

Responding to protests of the tribe that the agreement only implied a waiver, the Eighth Circuit Court of Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." The court found an explicit waiver of sovereign immunity. *Id.* at 563.

On remand, the district court granted summary judgment to the contractor and entered judgment in the amount of the arbitration award. The tribe appealed and the issue was again addressed in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998). There, the Eighth Circuit Court of Appeals reaffirmed its previous finding that the arbitration clause was an explicit waiver of sovereign immunity from suit.

The Court went on to explain how its decision in *Rosebud Sioux Tribe* was not inconsistent with its previous ruling in *American Indian Agricultural Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, at 1380 (8th Cir. 1985) stating the distinction that in *Standing Rock* the promissory note did not specifically designate an arbitral forum to settle all disputes and did not include a consent to judicial enforcement of the arbitration award. *Val-U Construction* at 577.

Waiver of sovereign immunity from suit by consent to arbitration was also found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, an Indian tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs and the architect proceeded to arbitration upon the contract for recovery of its services rendered.

The arbitration went forward without the tribe's participation, resulting in an award in favor of the architect. An action to confirm the arbitration award was stayed while the court considered whether sovereign immunity had been waived. Again, the arbitration agreement at issue therein contained language that was virtually identical to the arbitration provision of the agreement between Potawatomi and C&L, providing:

> 'Claims, disputes or other matters' arising out of or related to the contract 'shall be subject to and decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association' . . . that the agreement to arbitrate 'shall be specifically enforceable in accordance with applicable law in any court having jurisdiction'

> and that 'judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.'

Id. at 659.

Considering whether the arbitration agreement was a clear waiver of sovereign immunity. The court stated:

> **There is nothing ambiguous about this language**. The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. **To agree to be sued is to waive any immunity one might have from being sued.**

Id. (emphasis added).

Continuing, the Seventh Circuit Court of Appeals stated:

> The arbitration clause could not be much clearer . . . No one reading this clause could doubt that the effect was to make the tribe suable. The waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause.

Id. at 660.

Finally, the Seventh Circuit Court of Appeals directly addressed and rejected the arguments raised herein by Potawatomi and apparently followed by the Oklahoma Court of Civil Appeals. The *Sokaogon* court stated:

> **The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that**. The examples are not limited to Indian law. When states or the federal government waive sovereign immunity, as in the Federal Tort Claims Act or the Tucker Act, they do not say they are waiving 'sovereign immunity'; they create a right to sue, just as in the arbitration clause here.

Id. (emphasis added).

The Court in *Sokaogon*, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.

In its Opinion, the Oklahoma Court of Civil Appeals agreed that C&L "makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts." The Court of Appeals went on to state that *Native Village of Eyak, supra*, cited in the proceedings below by C&L, was directly on point. *See* App. 5.

Finally, Oklahoma Court of Civil Appeals stated that the logic of *Native Village of Eyak* was "unassailable" but expressed concern that the court therein nevertheless relied on an implied waiver. Despite finding that the

arbitration agreement and contract language "indicate a willingness on Tribe's part to expose itself to suit on the contract," the court said that the "leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *See* App. 7.

The Opinion of the Oklahoma Court of Civil Appeals squarely conflicts with the unanimous opinions of courts having addressed this issue in the context of arbitration agreements with Indian tribes. Opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, the Alaska Supreme Court and the Arizona Supreme Court have consistently found an explicit waiver of sovereign immunity from language essentially identical to or even less explicit than the arbitration agreement at issue herein.

If the agreement here that "all claims or disputes . . . shall be decided by arbitration . . . and **judgment may be entered upon** [the award]," is not a clear and explicit waiver of immunity from suit to enforce an arbitration award, then the language is rendered meaningless. The question then must be: what specific language is required? If the specific words "we waive sovereign immunity" are required, then virtually every court other than the Oklahoma Court of Civil Appeals is not following such a rule.

Given the obvious magnitude of contracts bearing language essentially identical to the arbitration provisions at issue herein, this Court must speak to the matter and resolve the conflict between Oklahoma and every

other jurisdiction which has addressed waiver of sovereign immunity by this contract language.

CONCLUSION

This Court should grant the petition for writ of *certiorari*, reverse the judgment of the Oklahoma Court of Civil Appeals, Division 2, and remand with instructions consistent with prevailing opinions of other state and federal courts as set forth above.

Respectfully submitted,

JOHN D. MASHBURN
Counsel of Record
JAMES W. CARLTON JR.
GARVIN, AGEE, CARLTON & MASHBURN, L.L.P.
2100 City Place
204 North Robinson
Oklahoma City, OK 73102
(405) 232-9996 FAX (405) 232-4061

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed Wednesday, May 24, 2000)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

86,568 C & L Enterprises, Inc; v. Citizen Bank Pottawatomi Tribe of Oklahoma,
Petition for certiorari is denied.
CONCUR: Summers, C.J., Kauger, Boudreau, JJ.
CONCUR BY REASON OF STARE DECISIS: Watt, Winchester, JJ.
DISSENT: Hargrave, V.C.J., Hodges, Lavender, Opala, JJ.

/s/ Hardy Summers
CHIEF JUSTICE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., Appellee, vs. THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.	)	No. 86,568 NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

(Filed Feb. 8, 2000)

Honorable Leamon Freeman, Trial Judge

John Mashburn
Garvin, Agee, Carlton &
Mashburn
Oklahoma City, Oklahoma — For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma — For Appellant

OPINION

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award entered in a contract

dispute. The original opinion of this court, affirming the judgment of the trial court, was appealed by writ of certiorari to the United States Supreme Court. That Court vacated our judgment and remanded the case with instructions for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The case has been returned to us on January 7, 2000, for review pursuant to that reversal and remand. Based on our review of the record on appeal, and the cited case, we reverse the trial court judgment and remand with instructions to dismiss.

This lawsuit arose from a contract entered in August 1993, between the Citizen Band Potawatomi Indian Tribe (Tribe) and C&L Enterprises, Inc. (C&L). C&L was to construct a roof on a building being built by Tribe. The record indicates that the construction was a commercial endeavor by Tribe – Tribe had purchased land from First Oklahoma Bank and was constructing on the property what the contract designated: "The Building for the First Oklahoma Bank."

After execution of the contract with C&L, Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. It gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of the contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied Tribe's motion to dismiss and thereafter Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. Tribe appealed, largely maintaining that the trial court erred in its refusal to find it immune from suit.

This court first decided the appeal by following the authority of the Oklahoma Supreme Court as stated in *Hoover v. Kiowa Tribe of Oklahoma*, 1995 OK 136, 909 P.2d 59, which held that a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country. *Id.* at ¶9, 909 P.2d at 62. However, the United States Supreme Court considered the identical issue in an appeal from a judgment of another division of this court, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751 (1998), and decided directly to the contrary – that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at ___, 118 S. Ct. 1700, 1702. The Oklahoma Supreme Court, in a case involving a similar reversal with instructions to consider the case in light of *Manufacturing Technologies*, reversed its prior judgment and ordered the state district court to enter judgment for the tribe. *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1998 OK 126, 975 P.2d 450. In *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, 1998 OK 128, ¶11, 975 P.2d 442, 445, the Oklahoma Supreme Court expressly overruled its holding in *Hoover*.

We have reviewed our earlier decision in light of the United States Supreme Court decision in *Manufacturing Technologies*. We conclude that the trial court was not

vested with jurisdiction over the dispute by virtue of the fact that the contract that formed the basis of the controversy was executed and to be performed outside of Indian Country. However, because the Court in *Manufacturing Technologies* recognized that a tribe may waive its sovereign immunity, this court must determine if such a waiver occurred in this instance.

C&L argues that language in the parties' contract – which C&L claims was prepared by Tribe and its attorneys – constitutes Tribe's clear and unequivocal waiver of its immunity from suit. C&L references the contractual agreement to arbitrate as well as the specific language:

> The award entered by the arbitrator . . . shall be final, and the judgment may be entered upon it in accordance with applicable law *in any court having jurisdiction thereof*, . . . The agreement herein among the parties . . . to arbitrate . . . shall be specifically enforceable under applicable law *in any court having jurisdiction thereof.* (Emphasis added.)

C&L makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts. Further, C&L cites Alaska authority directly on point. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the Alaska Supreme Court held that an arbitration agreement, along with related mention of court enforcement, constituted a tribe's waiver of immunity. The court stated:

> [W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the

> parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

The logic of the *Native Village* court is unassailable, but we are concerned that the court analyzed the contract, which admittedly did not contain an express waiver, and relied on an implied waiver – language constituting a "sufficiently clear and unequivocal waiver of immunity to be effective." *Id.* at 758. It has long been the rule that tribal sovereign immunity can be surrendered only by express waiver. *Price v. United States*, 174 U.S. 373, 375-76 (1899). The United States Supreme Court more recently stated in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that tribal sovereign immunity may not be waived by implication but must be "unequivocally expressed." *Id.* at 58.

Citing the case of *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), C&L asserts that the language in the contract constitutes a sufficient expression of waiver on Tribe's part. The court in that case held that by the tribe's intervention into a lawsuit and its prior agreement to submit disputes over fishing to the Oregon federal district court, the tribe "expressly consented to [the] suit," and waived sovereign immunity. *Id.* at 1016.

However, other courts have been more reluctant to broaden the scope of what constitutes an express waiver. In fact, in *American Indian Agric. Credit Consortium Inc. v.*

Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985), the court referred to *United States v. Oregon* as "suggest[ing] substantially broader criteria for a finding of express waiver, and surely presses the outer boundary of what the Supreme Court intended by its plain statement in *Santa Clara Pueblo*," 780 F.2d at 1380.

In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.[1]

We conclude that the record does not support a finding of express waiver of immunity on the part of The Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgment of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991 § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

REVERSED AND REMANDED WITH INSTRUCTIONS.

GOODMAN, C.J., and REIF, J., concur.

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[1] Although the record does not give us any information regarding Tribe's legal system, another reasonable implication of the language of the contract might be that Tribe's own courts are the "court[s] having jurisdiction thereof" mentioned in the contract.

Supreme Court of the United States

***No.* 96-1721**

CITIZEN POTAWATOMI NATION,

Petitioner

v.

C&L ENTERPRISES, INC.

ON WRIT OF CERTIORARI to the Court of Civil Appeals of Oklahoma, Second Division.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Civil Appeals of Oklahoma, Second Division, for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U. S. ___ (1998).

IT IS FURTHER ORDERED that the petitioner Citizen Potawatomi Nation recover from C&L Enterprises, Inc., Three Hundred Dollars ($300.00) for costs herein expended.

June 1, 1998

Clerk's Costs: $300.00

Supreme Court of the United States

***No.* 96-1721**

CITIZEN POTAWATOMI NATION,

Petitioner

v.

C&L ENTERPRISES, INC.

ORDER ALLOWING CERTIORARI. Filed June 1, 1998.

The petition herein for writ of certiorari to the Court of Civil Appeals of Oklahoma is granted.

IN THE COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

DIVISION 2

(Filed Mar. 27, 2000)

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER (S):

86,568 C&L ENTERPRISES, INC., Appellee, vs. THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.

Appellee's Motion for Leave to File Supplemental Authorities or Supplemental Brief is DENIED because this court's opinion was filed on February 8, 2000.

Petition for Rehearing of Appellee is DENIED.

The Supersedeas Bond is ordered exonerated and the Clerk of the Appellate Courts is directed to tax all allowable costs against Appellee.

DONE in conference this 24th day of March, 2000.

/s/ Ronald J. Stubblefield
RONALD J. STUBBLEFIELD
Presiding Judge
Division 2

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed June 9, 2000)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

86,568 C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma.
Mandate shall issue but it's effectiveness shall be suspended pending the filing of petition for certiorari in U.S.S.C or expiration of time to file.

/s/ Hardy Summers
CHIEF JUSTICE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., an Oklahoma corporation, Appellee,	)	
vs.	)	No. 86,568
THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Appellant.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Leamon Freeman, Trial Judge

John Mashburn
James Carlton, Jr.
Garvin, Agee, Carlton & Mashburn
Oklahoma City, Oklahoma For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma For Appellant

MEMORANDUM OPINION

(Filed Nov. 5, 1996)

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award in a roofing contract dispute regarding non-trust, off-reservation property. Based on our review of the record on appeal and applicable law, we affirm.

In August 1993, the Citizen Band Potawatomi Indian Tribe (Tribe) entered into a contract with C&L Enterprises, Inc., (C&L) for C&L to construct a roof on a building being built by the Tribe. The record indicates that the construction was a commercial endeavor by the Tribe – the Tribe had purchased the land from First Oklahoma Bank some four months earlier and was constructing on the property what the contract designated "The Building for The First Oklahoma Bank."

After execution of the contract with C&L, the Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. They gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of their contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

The Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied the Tribe's motion to dismiss and, thereafter, the Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. The Tribe appeals largely maintaining that the trial court erred in its refusal to find it immune from suit.

Dispositive of this issue is the case of *Hoover v. Kiowa Tribe of Oklahoma,* 909 P.2d 59 (Okla. 1995). The *Hoover* court dealt with the identical issue – whether "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Id.* at 60; *see also First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee,* 913 P.2d 299 (Okla. 1996). The *Hoover* court answered the question in the affirmative.

The *Hoover* court cited favorably the New Mexico case of *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (N.M. 1988), *cert. denied* 490 U.S. 1028 (1989), which also dealt with a dispute between a non-Indian roofing contractor and an Indian Tribe over roofing contract work performed on two building projects located off the reservation. The New Mexico court in *Padilla* found that the tribe was not immune from suit.

The *Hoover* court held that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62. It is not disputed that, in this instance, the construction project was on newly purchased land that was neither trust nor reservation land. Thus, we conclude that *Hoover* directly controls on the issue of tribal immunity.

The Tribe also claims the lower court erred in not *sua sponte* reviewing "patent legal issues and/or examining the damage evidence." However, the Tribe admits that it raised none of these "substantive issues" in the lower court. Parties are simply not permitted to raise issues on appeal that were not raised in the trial court. *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230, 1236 (Okla. 1989). "[I]t is well settled that a litigant may not remain silent and speculate on the outcome of the trial, and then complain on appeal." *Missouri-Kansas-Texas R.R. Co. v. Callison*, 383 P.2d 696, 699 (Okla. 1963).

The Tribe also complains of the award of attorney fees, based largely on the basis of immunity – an issue we have already resolved against it. It also complains that the award was supported by "insufficient and incomplete" evidence. Once again, this was not an issue raised in the lower court. However, we note that the lower court was presented with contemporaneous time records, which support the lower court's judgment. *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). Furthermore, the record indicates that purportedly unrelated legal matters were all directed at maintaining the lawsuit in the District Court of Oklahoma County and in defending that court's jurisdiction over the dispute.

The judgment of the lower court is AFFIRMED in all regards.

GOODMAN, P.J., and BOUDREAU, J., concur.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation, Appellee, v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.	)	No. 86,568

ORDER AND JUDGMENT ON SUPERSEDEAS BOND

(Filed Jan. 27, 1997)

Certiorari is denied. Appellee's motion for an appeal-related counsel fee is granted. 12 O.S. 1991 § 936; *Sisney v. Smalley,* Okl., 690 P.2d 1048, 1051 (1984). Following the issuance of mandate the trial court is authorized to determine the amount of the appeal-related counsel fee to be awarded to the appellee in an adversarial hearing after proper notice.

Appellee's motion for judgment on supersedeas bond is granted. Judgment is hereby rendered on the supersedeas bond against Citizen Potawatomi Nation as principal, and Mid-Continent Casualty Company, as surety, in the amount of $28,499.63 plus $11,077.39, with interest thereon at the statutory rate from October 27, 1995 and from March 21, 1996, respectively, until paid, not to

exceed the penal sum of the supersedeas bond. The district court is directed to enforce this judgment as if rendered in that court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27th DAY OF JANUARY, 1997.

/s/ Ralph B. Hodges
ACTING CHIEF JUSTICE

HODGES, LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., concur.

OPALA, J., concur in denying certiorari; concur in part and dissent in part from the counsel-fee award judgment on supersedeas bond. The award is flawed because it does not include a certiorari-related fee. The judgment should be only against the surety.

KAUGER, C.J., SUMMERS, V.C.J., Dissent.

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

ORDER TAXING ATTORNEY FEES AND COSTS

(Filed March 21, 1996)

ON THIS DAY, there comes on for hearing Amended Application of Plaintiff for an order taxing attorney fees and costs, Plaintiff appearing by counsel of record and Defendant appearing not.

The Court having previously granted judgment for said Plaintiff wherein the Court ordered that Plaintiff shall recover its costs herein and a reasonable attorney's fee, pursuant to 12 O.S. § 936, and the court having further considered the statements of counsel, the applications filed herein, the time records of counsel for said Plaintiff, and the expenses incurred herein, the Court finds that the costs and attorney fees set forth below are reasonable and should be assessed against Defendant and taxed as part of the judgment herein.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED that Plaintiff, C & L ENTERPRISES

INC., shall have and recover of and from Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $10,545.00 which the Court determines to be a reasonable attorney's fee, additional accrued costs in the sum of $532.39 and all accruing costs, to be taxed with the Judgment previously entered herein.

DATED THIS 21 DAY OF March, 1996.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN, OBA #12763
Attorneys for Plaintiffs
2100 City Place
204 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 21 day of March, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT CONFIRMING ARBITRATION AWARD

(Filed Oct. 27, 1995)

ON THIS DAY, there comes on for hearing Petition of Plaintiff by Plaintiff's Motion for Confirmation of Arbitration Award, Plaintiff appearing by its attorney and Defendant appearing ~~by its attorney~~ not,

And the Court having reviewed Plaintiff's Petition filed pursuant to 15 O.S. § 815, the arbitration agreement at issue and the arbitration award entered between the parties on June 30, 1995, and Defendant not having urged vacation, modification or correction of said award within the time prescribed by 15 O.S. §§ 811-813,

The Court finds that said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801-818 and that the Award of Arbitrator as attached to Plaintiff's Petition was

duly entered, is binding upon the parties and, for good cause shown, should be confirmed.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED by the Court that Plaintiff have and recover of and from Defendant, Judgment confirming the Award of Arbitrator attached to Plaintiff's Petition as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment at 8.31% per annum until paid, a reasonable attorneys' fee to be determined upon application of Plaintiff, accrued costs in the sum of $84.96, and all accruing costs.

DATED THIS 27 DAY OF OCTOBER, 1995.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN – OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 27 day of October, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Oct. 13, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
204 N. Robinson
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204

Citizen Band Potawatomi Tribe of Oklahoma
a/k/a Citizen Band Potawatomi Indians of Oklahoma

Defendant(s)

/s/ Michael Minnis David McCullough
Attorney(s) for Defendant(s)
3160 Liberty Tower
100 N. Broadway,
Okc, OK 73102

COURT ORDER

Date: October 13, 1995 Judge Leamon Freeman
Hearing On: Motion to Reconsider
Ruling By Court: Denied

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Sep. 22, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204-64

Citizen Band Potawatomi Tribe
Defendant(s)

/s/ Michael Minnis
Attorney(s) for Defendant(s)
3160 Liberty Tower
Okc, [sic] 73102
235-7686

COURT ORDER

Date: 9/22/95 Judge _____
Hearing On: Motion to Dismiss
Ruling By Court: Overruled, Defendant granted 20 days to answer.

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES, INC.,

Plaintiff,

v. Case No. CJ-95-5204-64

CITIZEN BAND POTAWATOMI TRIBE
OF OKLAHOMA a/k/a CITIZEN BAND
POTAWATOMI INDIANS OF OKLAHOMA.

MOTION TO DISMISS
(Filed Aug. 25, 1995)

COMES NOW the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi"), appearing specially, and moves the court to enter an order dismissing the "Petition for Confirmation of Arbitration Award" (August 7, 1995) filed herein on the basis that this court lacks jurisdiction over the person of the "Potawatomi", that the Potawatomi lack the capacity to be sued, or, alternatively, that the service of process was insufficient. 12 O.S. 1991, § 2012, ¶¶ B.2, B.9 and B.5. Consistent with District Court Rule 4, this motion is accompanied by a concise brief.

MICHAEL MINNIS & ASSOCIATES, P.C.

By /s/ Michael Minnis
Michael Minnis, OBA #6251
David McCullough,
OBA #10898
3160 Liberty Tower
100 North Broadway
Oklahoma City, OK 73102
(405) 235-7686
ATTORNEYS FOR CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 1995, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

John Mashburn
2100 City Place
204 North Robinson
Oklahoma City, OK 73102

ATTORNEY FOR PLAINTIFF

/s/ Michael Minnis
Michael Minnis
David McCullough

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	CASE NO. CJ-95-5204-64
v.	)	
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

PETITION
FOR CONFIRMATION OF ARBITRATION AWARD

(Filed Aug. 7, 1995)

COMES NOW Plaintiff and for its cause of action against the Defendant and pursuant to 15 O.S. § 815, respectfully states and alleges the following:

1. On August 25, 1993, the parties entered into a contract, executed within the State of Oklahoma, whereby Plaintiff was to surface the roof of a building for The First Oklahoma Bank, in Shawnee, Oklahoma. A true and correct copy of said contract is attached hereto as Exhibit "A" and incorporated herein.

2. Said contract was executed, for Defendant, by three officers of the Defendant including the Defendant's Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis, and one other currently unidentified officer.

3. Said officers had actual and/or apparent authority to bind Defendant upon said contract.

4. The land which is the subject of the construction contract at issue herein, although currently owned by the Defendant, is neither Indian reservation nor "trust" land and was not validly set apart for the use of the Defendant as such under the superintendence of the Federal Government.

5. Plaintiff believes and therefore alleges that Defendant obtained or used funds for construction of the above-referenced bank which were non-tribe funds; *for example,* Economic Development Grant or other government grant funds.

6. In the event "Tribal Sovereignty" could have otherwise attached to the transactions between the parties, which Plaintiff denies, such sovereignty was waived by Defendant pursuant to the terms of the contract whereby the parties agreed to submit any claims or disputes to arbitration and further agreed that the award rendered by the arbitrator would be final, and judgment could be entered upon it in accordance with applicable law in any court having jurisdiction thereof, all as set forth at Article 10.8 in Exhibit "A."

7. Plaintiff complied with the terms of said contract and presented its demand for arbitration upon the breach of Defendant.

8. On June 30, 1995, after receiving the written statements and documents of the parties and having heard the evidence presented, the Arbitrator duly rendered an award for the Plaintiff as set forth in Exhibit "B" which is attached hereto and incorporated herein.

9. Said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801 - 818.

10. Jurisdiction is proper with this Court by reason of execution of said contract within Oklahoma and by application of 15 O.S. § 802.B.

11. Venue is proper with this Court by virtue of Defendant's waiver of venue in Article 10.8 of Exhibit "A," and pursuant to the requirements of 15 O.S. § 816 as the arbitration hearing occurred in Oklahoma County, Oklahoma.

12. Defendant has wholly failed and refused to pay said Arbitration Award thereby necessitating the filing of this action for which Plaintiff is entitled to additional attorney's fees and costs.

WHEREFORE, Plaintiff prays that the Court enter Judgment confirming the Arbitration Award attached hereto as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment according to law, a reasonable attorneys' fee and all costs of this action.

GARVIN, AGEE, CARLTON
& MASHBURN

BY: /s/ John Mashburn
JOHN MASHBURN –
OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

PLAINTIFF'S
EXHIBIT
A

AIA Document A107

Abbreviated Form of Agreement
Between Owner and Contractor

For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

This document includes abbreviated General Conditions and should not be used with other general conditions. It has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT

made as of the Twenty-Fifth day of August in the year of Nineteen Hundred and Ninety-Three

BETWEEN the Owner: Citizen Band Potawatomi
(Name and address) Tribe of Oklahoma
1901 South Gordon Cooper Drive
Shawnee, Oklahoma 74801

and the Contractor: C & L Enterprises Inc.
(Name and address) P.O. Box 406
Lindsay, Oklahoma 73052

The Project is:
(Name and location)

The Building for
The First Oklahoma Bank
Shawnee, Oklahoma
Project Number 9202

The Architect is:
(Name and address)

Price Group Architects
and Planners
14 East 9th
Shawnee, Oklahoma 74801
273-2200

The Owner and Contractor agreed as set forth below.

Don Dunning
Mobil – 620-1590

660-5700-
PAGER

Call Don on Ap 25 11:30

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ARTICLE 1

THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent

specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

Furnish roofing consisting of Perlite Board Foam Insulation, 1 Inch, 52 Mils Neogard 70613 Series Coating, Five Year Warranty, One Year Defect Bond, Eleven (11) RoofDrains, Cap Flashing.

See Attachment #1

ARTICLE 2

DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or if applicable, state that the date will be fixed in a notice to proceed.)

Date will be fixed per notice to proceed.

2.2 The Contract shall achieve Substantial Completion of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

Per construction managers schedules.

subject to adjustment of the Contract Time as provided in the Contract Documents.

(Insert provisions, if any for liquidated damages relating to failure to complete on time.)

ARTICLE 3

CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Eighty-Five Thousand Dollars ($85,000.00), subject to additions and deductions as provided in the Contract Documents.

3.2 The Contract Sum is based upon the following alternates. If any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

Not applicable

3.3 Unit prices, if any, are as follows:

None

ARTICLE 4

PROGRESS PAYMENTS

4.1 Based upon Applications for Payments submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

> Applications for payment to be submitted on or before the 25th day of each month. Payment of said application due on or before the 5th day of the following month.

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business. The location of the project and elsewhere may affect the validity of this provision. Legal advice should be obstained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5

FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6

ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___, and are as follows:

Document ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.3. The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2., and are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.4 The Drawings are as follows, and are dated ___ unless a different date is shown below:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number ___ Title ___ Date ___

Per Plans and Specifications.

6.1.5 The Addenda, if any, are as follows.

Number ___ Date ___ Pages ___

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows:

(List any additional documents which are intended to form part of the Contract Documents.)

GENERAL CONDITIONS

ARTICLE 7

CONTRACT DOCUMENTS

7.1 The contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions). Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The intent of

the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8

OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9

CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution

and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other

permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve, and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specification, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10

ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally

familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for

results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance or final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings. Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought

to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11

SUBCONTRACTS

11.1 A subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not

be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12

CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction

and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13

CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construct Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14

TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15

PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the contract documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by the payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16

PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2. The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining

this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

17.4. A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work, except such rights as they may

have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors agents and employees of any of them.

ARTICLE 18

CORRECTION OF WORK

18.1. The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct

the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19

MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion:

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20

TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses

made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21

OTHER CONDITIONS OR PROVISIONS

Attachment Page 1.

This Agreement entered into as of the day and year first written above.

OWNER /s/ John A. Barrett, Jr. CONTRACTOR

/s/ Bob F. Davis Sec/Trea.
(Signature)

/s/ Lynn D. Scruggs
(Signature)

/s/ Hilton L. Melot
(Printed name and title)

C & L Enterprises Inc.
(Printed name and title)

[LOGO] Caution: You should sign an original AIA document which has this caution printed in red. An original assures that changes will not be obscured as may occur when documents are reproduced.

PROPOSAL

P.O. Box 406
Lindsay OK 73052
Lynn Scruggs 756-8415

No.
Date July 25, 93
Sheet No.

Proposal Submitted To:

Name Pottawatomi Tribe
Street 1901 S. Gordon
Cooper Drive
City Shawnee, OK 74801
State
Phone Mr. Don Dunning
275-3121

Work To Be Performed At:

RE: First Oklahoma Bank
Street
City State
Date of Plans
Architect
Fax 335-0198

We hereby propose to furnish the materials and perform the labor necessary for the completion of

Roof on Bank – Project #9202 – The Price Group

Roof Bid – Perlite Board, Foam Insulation, 1 inch
52 Mils Neosard - 70613 Series Coating
Five Year Warranty
One Year Defect Bond
11 Roof Drains
Cap Flashing

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of Eighty Five thousand dollars Dollars ($ 85,000).

with payments to be made as follows: _____

Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance upon above work. Workmen's compensation and Public Liability insurance on above work to be taken out by

Respectfully submitted
/s/ Lynn W. Scruggs
Per /s/ Lynn W. Scruggs

Note – This proposal may be withdrawn by us if not accepted within ___ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date

Signature

Signature

PLAINTIFF'S
EXHIBIT
B

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY
ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Re: 71 E 110 00024 95
C & L Enterprises, Inc.
vs.
Citizen Band Potawatomi Tribe of Oklahoma
Oklahoma City, OK

ADMINISTRATOR: Tracey L. Hegeman

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties, and dated August 25, 1993, and having been duly sworn and having duly heard the proofs and allegations of C & L Enterprises, Inc. ("C & L"), and Citizen Band Potawatomi Tribe of Oklahoma ("Potawatomi") having failed to appear after due notice by mail in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Association"), hereby, AWARD, as follows:

Potawatomi shall pay to C & L the sum of Twenty Five Thousand Four Hundred Dollars and No Cents ($25,400.00).

Potawatomi shall pay to C & L the sum of Two Thousand Two Hundred Thirty Dollars and No Cents ($2,230.00) for attorney's fees.

Potawatomi shall pay to C & L the sum of Thirty Four Dollars and Sixty Seven Cents ($34.67) for attorney's costs.

The administrative fees of the American Arbitration Association totaling $763.00 shall be borne by Potawatomi. Therefore, Potawatomi shall pay to C & L the sum of $750.00 representing that portion of C & L's share of administrative fees previously paid to the Association. Potawatomi shall pay to the Association the sum of $13.00 representing that portion of Potawatomi's share of administrative expenses still due the Association.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are, hereby, denied.

DATE: June 30, 1995

SIGNED: /s/ Peter B. Bradford
Peter B. Bradford, Arbitrator

Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

vs.

CITIZEN POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Opinion Below by the Oklahoma Court of Civil Appeals has been decided in a way that conflicts with *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

On August 25, 1993, C&L Enterprises, Inc., ("C&L"), Petitioner, signed an "Abbreviated Form of Agreement Between Owner and Contractor" (1987 edition)[1] copyrighted by the American Institute of Architects ("AIA") to construct a foam roof on a building located on land[2]

[1] A copy of this document was attached as Plaintiffs' Exhibit A to the petition. *See* App. 32.

[2] The building is located on land owned by the Potawatomi that has not yet been taken into trust by the United States. The land is "restricted Indian land." 25 U.S.C. § 177. As restricted Indian land, the consent of the United States is a prerequisite to alienation.

owned by the Citizen Potawatomi Nation ("Potawatomi") for $85,000.

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubberguard, not foam. On April 19, though lacking the ability to build a rubberguard roof, C&L offered to lower the foam roof price by $6,600, allegedly signed a contract with a subcontractor who would build the rubberguard roof, and submitted an offer that was $21,616 higher than the price charged by the contractor who ultimately constructed the rubberguard roof for $56,784.

On January 24, 1995, though C&L never initiated any work, C&L submitted the foam roof agreement to an arbitrator. Upon receiving notice of the arbitration, the Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim,[3] but had no intention of waiving immunity by participating in the arbitration proceedings.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign

[3] 25 U.S.C. § 81 requires any agreement with an Indian tribe for the payment of money "in consideration of services for said Indians relative to their lands" to have the approval of the Secretary of the Interior endorsed thereon. Absent such endorsements, an agreement is "null and void." The C&L foam roof agreement was not so endorsed.

immunity nor explain how the amount of the award was computed.[4]

On August 7, C&L filed suit[5] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to dismiss based on sovereign suit immunity.[6] Without a hearing, the District Court denied the Potawatomi motion to dismiss [App. 25] and a subsequent motion for reconsideration. App. 24. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[7]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default

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[4] A copy of the arbitrator's award is Exhibit B to the Petition. *See* App. 61. C&L has subsequently suggested that the damages awarded by the arbitrator were based on the difference between the C&L agreement price ($85,000) and the subcontractor's price. *See, e.g.*, "Answer Brief of Appellee" at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[5] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) ("Petition for Confirmation of Arbitration Award"). App. 28.

[6] App. 26. In the supporting brief, the Potawatomi raised both sovereign immunity and the 25 U.S.C. § 81 deficiency. *See* "Brief in Support of Motion to Dismiss," at 5, n. 17 (filed Aug. 25, 1995).

[7] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

judgment against the Potawatomi for $28,414.67. App. 21. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[8] and the Potawatomi timely appealed to the Oklahoma Supreme Court.[9]

On March 21, 1996, C&L obtained a second default judgment from the District Court for $10,545 in attorney's fees and costs.[10]

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[11] directly controls on the issue of tribal immunity"[12] and that the Potawatomi waived any other defects in C&L's cause of

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[8] *See id.* at Order, Dec. 13, 1995.

[9] The Potawatomi asserted, *inter alia*, that the District Court erred by purporting to exercise jurisdiction over an unconsenting Indian tribe and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See, e.g.*, "Brief of Appellant," at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

[10] App. 18. This judgment was also appealed. Most of the work allegedly supporting C&L's fees was performed post judgment in other litigation. Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L. Of the fees awarded, 72% ($7,620) were for services allegedly performed post judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgment entered by the District Court.

[11] *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 517 U.S. 1188 (1996).

[12] App. 14. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 14-15.

The Potawatomi timely petitioned the Oklahoma Supreme Court for review by *certiorari*. This petition was denied January 27, 1997. The Potawatomi then timely appealed to this Court. On June 1, 1998, this Court granted the Potawatomi petition for *certiorari*, vacated the judgment of the Oklahoma Court of Civil Appeals and remanded the case "for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 [(1998).]"[13] *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, 524 U.S. 901 (1998). App. 8.

On February 8, 2000, the Oklahoma Court of Civil Appeals, Division 2, issued an opinion reversing the judgment of the District Court for C&L and remanding with instructions to sustain the Potawatomi motion to dismiss filed August 25, 1995.

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.

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[13] On July 1, 1998, the Clerk of the United States Supreme Court advised the Clerk of the Court of Civil Appeals of Oklahoma that the Potawatomi "is given recovery of costs in this Court" of "Clerk's costs" in the amount of $300 that "may be collected through the Court of Civil Appeals of Oklahoma, Second Division, or from opposing counsel or parties."

> We conclude that the record does not support a finding of express waiver of immunity on the part of the Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgement of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991, § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

App. 7. Following unsuccessful appeals at the state court level, C&L has appealed to this Court.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. C&L has raised only one potentially valid reason for granting the writ: an alleged conflict between the Opinion Below and cases from other states and federal circuit courts of appeal. This stated reason is not compelling because the Opinion Below is consistent with this Court's sovereign immunity jurisprudence and with this Court's disposition of this case in prior proceedings.

ARGUMENT

C&L, though it never performed any work for the Potawatomi,[14] has been pursuing the tribe for more than

[14] Pet. at 7.

five years, forcing the tribe to expend resources on wasteful – now, arguably, frivolous – litigation. C&L's petition should be denied, *inter alia*, because it asks this Court to reconsider questions presented by C&L in prior proceedings before this Court. Moreover, although "courts have consistently determined that the interpretation of Indian law is a matter of federal law,"[15] C&L urges this court to abandon "nearly two hundred years of recognizing sovereign immunity's extra-territorial reach"[16] and to subject tribes to the reach of state courts without a clear waiver of sovereign immunity. C&L bases its arguments on case law filled with outdated, dubious reasoning and unsolicited paternalism. C&L cites no controlling authority decided or enacted since the prior proceedings before this Court that demonstrate any error in the Opinion Below.

Proposition: The Opinion Below is consistent with *Kiowa Tribe v. Manufacturing Technologies, Inc.*

An Indian tribe is immune from suit unless the tribe has clearly waived sovereign immunity. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional

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[15] *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993) (contractor's suit for breach of contractor in state court enjoined).

[16] *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994).

abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (although tribe consents to court's jurisdiction to claims brought by it, that consent does not waive sovereign immunity for counterclaims brought against it).

Similarly, unless agreed to by an Indian tribe, a state court generally has no jurisdiction over that tribe. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 61-62 (1996):

> If anything, the Indian Commerce Clause[17] accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

In prior proceedings in this litigation, this Court granted the Potawatomi petition for *certiorari*, vacated a state court decision in favor of C&L and remanded to the Oklahoma Court of Civil Appeals "for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 [(1998).]" App. 8. In *Kiowa Tribe*, this Court reversed a decision of the Oklahoma Court of Civil Appeals, stating that:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not

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[17] U.S. CONST. art. I, § 8, cl. 3.

> abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe, 523 U.S. at 760.

In *Kiowa Tribe*, this Court explicitly rejected the notion that sovereign immunity contains a territorial component, *i.e.*, that sovereign immunity is waived if a contract is executed or is to be performed outside a tribe's reservation or trust lands. The decision also dispelled the notion that a tribe waives sovereign immunity merely by engaging in commercial activity.

On remand from this Court, the Court of Civil Appeals entered the proper order – indeed, the only order it could enter consistent with this Court's mandate on remand[18] – and dismissed C&L's claims for lack of jurisdiction over the Potawatomi. The Court of Civil Appeals correctly recognized that the Potawatomi had

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[18] When, as in the prior proceedings in this litigation, the Court issues an order granting certiorari, vacating the judgment below and remanding the case (a "GVR" order), it does so in part to "assist[ ] the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence v. Chatter*, 516 U.S. 163, 167 (1996).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id.

not waived immunity, and, absent a waiver, Oklahoma could not exercise jurisdiction over the tribe.

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.

App. 7. Not only is the Opinion Below consistent with *Kiowa Tribe* and this Court's mandate on remand, but it is consistent with this Court's longstanding sovereign immunity jurisprudence.[19]

C&L's sole proposition is that "[t]he Oklahoma Court of Civil Appeals declined to enforce the arbitration agreement contrary to the opinions of other state and federal courts consistently finding such agreements waive sovereign immunity."[20]

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[19] A tribes's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance. * * * tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986). Even assuming, *arguendo*, the Court of Civil Appeals used a too-strict sovereign immunity analysis, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

[20] Pet. at 11. In the "Constitutional and Statutory Provisions Involved" portion of its brief, C&L cites several Oklahoma statutes concerning arbitration. Pet. at 2. These provisions are not discussed anywhere in the brief.

The cases upon which C&L relies provide only superficial support for its theories. First, all but one of the cases predate this Court's decision both in this litigation and in *Kiowa Tribe*.[21] Second, C&L relied on these cases in the prior proceedings before this Court that were resolved in favor of the Potawatomi.[22] The standard against which to evaluate the judicial soundness of the Opinion Below is this Court's pronouncements on the subject of sovereign immunity, not older cases from lower courts.[23] This Court

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[21] *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998) was decided approximately one week after this Court's decision in *Kiowa Tribe*.

[22] In its opposition brief in Case No 96-1721, C&L cited *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996), *Val/Del, Inc., v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) for the same propositions asserted herein.

[23] The Opinion Below is consistent with a growing body of post-1998 Oklahoma case law upholding tribal sovereign immunity based on this Court's decision in *Kiowa*. *See Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1998 OK 126, 975 P.2d 450, 451 ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States. * * * Enforcement of such a judgment could result in the state's diminution of tribal immunity.") (decision on remand from U.S. Supreme Court); *Hoover v. Kiowa Tribe of Oklahoma*, 1999 OK 6, 986 P.2d 516, 517 ("as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. * * * Tribal immunity is a matter of federal law and is not subject to diminution by the States.") (citing *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 760 (1998), quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).

need not speak[24] to the relevance of the arbitration agreement because it has already spoken.

C&L has not cited any case law or congressional action since the prior proceedings before this Court that would cause this Court that demonstrate that the Opinion Below is inconsistent with this Court's mandate on remand, its decision in *Kiowa Tribe* or its established sovereign immunity jurisprudence. Absent a showing of such conflict, C&L has failed to demonstrate a compelling reason to grant its petition for certiorari.

C&L implies that the critical contract provisions, including the arbitration clause, were drafted by the Potawatomi.[25] This is not accurate. The agreement at issue is a form contract copyrighted by the American Institute of Architects ("AIA") in 1987. Paragraph 10.8 of article 10 ("Administration of Contract") contains the sentence: "The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." The arbitration clause, one of eight paragraphs in the tenth of 20 articles, is part of a standard form that was not tailored in any way for an Indian tribe.

C&L wants this arbitration clause to serve double duty: first to authorize arbitration, and second, to be an explicit waiver of suit immunity. The clause authorizes arbitration. To construe the clause as an express waiver of immunity when waiver and immunity are not mentioned

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[24] Pet. at 21-22.

[25] Pet. at 6, 11.

would effectively rewrite the contract contrary to law.[26] "If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations." *Simpson v. United States*, 172 U.S. 372, 379 (1899).

The language in the arbitration clause cited by C&L is not an unambiguous waiver of sovereign immunity but merely provided that the award would be enforceable "in accordance with applicable law **in any court having jurisdiction thereof.**"[27] This language is not an explicit waiver of suit immunity. It is clearly not a grant of jurisdiction to any particular court.[28] Because the Potawatomi have not waived suit immunity for claims under the C&L agreement, no court "has jurisdiction thereof." Under the applicable law announced by this Court, C&L's suit must be dismissed.

C&L's comments that the Potawatomi were "represented by counsel [during arbitration proceedings] and repeatedly corresponded" with the American Arbitration

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[26] The contract terms are not ambiguous; the contract simply contains no waiver of sovereign immunity. To read a waiver of sovereign immunity into a contract that otherwise does not discuss sovereign immunity would go beyond the plain language of the contract in violation of Oklahoma law. *See Founders Bank & Trust Co. v. Upsher*, 1992 OK 35, 830 P.2d 1355, 1361-1362.

[27] Pet. at 6; App. 46-47 (emphasis added).

[28] "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

Association in this matter[29] gain it nothing. The extent to which this Court will require an explicit waiver is evidenced by its decision in *Oklahoma Tax Comm'n v. Potawatomi Tribe, supra.* In that case, the Oklahoma Tax Commission acknowledged that Indian tribes generally enjoy sovereign immunity, but argued that the Potawatomi waived their sovereign immunity by seeking to enjoin the Commission's proposed tax assessment. This Court held that a tribe "does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.*, 523 U.S. at 509. This is true even if the counterclaim is compulsory. *Id.*

Although C&L may be correct that an effective waiver does not require the recitation of any particular incantation or the invocation of any special words, a defendant tribe must have demonstrated the intent to waive immunity by more than merely signing a form contract. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969)." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither

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[29] Pet. at 7. The Potawatomi asserted sovereign immunity in correspondence with the arbitrator, but the arbitrator never replied or articulated why sovereign immunity might not apply. App. 61.

mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

The Opinion Below notes that "another reasonable implication of the language of the contract might be that the Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." App. 7 n. 1. This footnote reflects the fact that a clear, unambiguous waiver for suit in Oklahoma's state courts cannot be found in the contract language upon which C&L relies. This need to speculate renders the contract language unusable and impermissible as a waiver of immunity. Because a waiver is not clearly expressed, the Court would have to infer a waiver of tribal sovereign immunity contrary to its own controlling decisions.

C&L would have this Court strip the words "clear" and "unequivocal" of any meaning and overrule its prior decisions that a waiver cannot be inferred. At a minimum, a clear and unequivocal waiver of sovereign suit immunity would include the words "waiver" and "suit immunity" and be in a clause labeled "waiver," not in a clause labeled "Administration of the Contract."

Indian tribes are immune from unconsented suit. Such consent must be clear and unambiguous. C&L can point to no clear, unambiguous waiver of sovereign immunity in the contract upon which it bases its claim. Absent a waiver, C&L's claim must fail.

C&L cites *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998), where the Eighth Circuit found that an arbitration clause waived immunity. Pet. at 7. The Eighth Circuit's decision in *Val-U Construction* is

proof of the adage that "bad facts make bad law." Unlike C&L,[30] Val-U Construction had performed a substantial amount of work for the defendant tribe when the tribe terminated the contract.[31]

The Eighth Circuit tried to distinguish the *Val-U Construction* decision from its earlier decision in *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*,[32] by stating that the contract in *Val-U Construction* designated an arbitral forum to settle all disputes. *Val-U Construction* at 577. C&L urges this Court to use this

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[30] C&L never performed *any* service for the Potawatomi under the agreement. Pet. at 7.

[31] The decision in *Val-U Construction* is inconsistent with law from the Tenth Circuit and other federal courts. *See, e.g., Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) (tribal defendants did not expressly waive sovereign immunity of tribal authorities by agreeing to attorney fee clause in construction contract, consenting to partial summary judgment with respect to certain disputed sums owed under the contract, or including "sue or be sued" clause in tribal corporate charter). Where waivers have been found, the waivers have been explicit. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (tribal council passed formal resolution, approved by the Secretary of the Interior, expressly waiving sovereign immunity) and *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (tribal bingo agreement expressly "waive[d] sovereign immunity" for actions brought to enforce or interpret contract).

[32] 780 F.2d 1374, 1380 (8th Cir. 1985) (promissory note reserving "rights and remedies provided by law" in favor of lender, providing for attorney fees in the event of a collection action, and containing a conflict of laws provision did not constitute express waiver of promisee tribe's sovereign immunity).

distinction as a basis to find in its favor. However, as noted above, the arbitration clause at issue herein merely stated than any arbitration award would be enforced "in accordance with applicable law **in any court having jurisdiction thereof.**" Because the Potawatomi did not expressly consent to suit in the District Court for Oklahoma County, the trial court did not have "jurisdiction thereof."

C&L also cites *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). Pet. at 18-20. In *Sokaogon*, the Seventh Circuit found an effective waiver of sovereign immunity in an arbitration clause similar to the one at issue herein.

> Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and **this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit,** especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions.

Sokaogon, supra at 659-660 (emphasis added).

The Seventh Circuit's "doubt" about the explicitness required to find a waiver of suit immunity was subsequently put to rest by this Court in *Kiowa Tribe v. Manufacturing Technologies, Inc., supra*. This Court has vacated and remanded other cases from the Oklahoma Supreme

Court based on similarly paternalistic reasoning.[33] Even were case law from the Seventh Circuit controlling, its reasoning in *Sokaogon* is not persuasive.

C&L also relies on state cases[34] that misconstrued a Ninth Circuit case to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision[35] held that an Indian tribe waived suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution."[36] The Ninth Circuit later recognized that state courts (Alaska and Arizona)[37] had misconstrued its pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity,

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[33] *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1997 OK 62, 939 P.2d 1143, 1147 (rejecting the argument "that Oklahoma's judicial power can only be extended over her Indian tribes upon express tribal or congressional consent"); vacated and remanded *sub nom Kiowa Tribe v. Aircraft Equip. Co.*, 524 U.S. 901 (1998).

[34] Alaska [*Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)] and Arizona [*Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. App. 1985)].

[35] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

[36] *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

[37] *Id.* at 419-20.

but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereign," the Ninth Circuit refused "to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration clause." *Id.* at 420. Nothing remotely similar occurred here. The Potawatomi have consistently and unmistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They have never intervened in any litigation. In any event, these state cases cannot overrule United States Supreme Court decisions holding that it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

CONCLUSION

C&L's Petition for Certiorari should be denied.

Respectfully submitted,

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No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

BRIEF FOR PETITIONER

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38 pp

QUESTIONS PRESENTED

I. Is an arbitration agreement, contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land boundaries, enforceable by the proceedings, including suit in state court, provided for in the arbitration agreement?

II. Where the arbitration agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ,

does execution of such an arbitration agreement constitute a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings?

PARTIES TO THE PROCEEDING BELOW

The Petitioner (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

The Respondent (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma. Respondent was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

CORPORATE DISCLOSURE STATEMENT

Petitioner, C&L Enterprises, Inc., is a non-governmental corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The original opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, filed November 5, 1996, affirming judgments of the District Court of Oklahoma County, Oklahoma, in favor of Petitioner (Pet. App. 12) is not reported. Respondent's Petition to this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721), was granted by this Court on June 1, 1998, and, on the same date, this Court ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This Court's orders are reprinted at Pet. App. 8, 9. The opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, reversing, on remand, the judgments of the District Court of Oklahoma County, Oklahoma, filed February 8, 2000 (Pet. App. 2), is not reported. The Order of the Court of Civil Appeals for the State of Oklahoma, Division 2, filed March 27, 2000, denying the Petitioner's petition for rehearing (Pet. App. 10), is not reported.

BASIS FOR JURISDICTION

The opinion and judgment of the Court of Civil Appeals of Oklahoma was filed February 8, 2000. Petitioner's timely petition for rehearing was denied by order filed March 27, 2000. Petitioner's timely petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court, the state court of last resort, was

denied May 24, 2000. The petition for a writ of certiorari was filed August 22, 2000 and granted on October 30, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Okla. Stat. tit. 15 § 802 (West 1993) provides:

§ 802. Application of act – Courts – Jurisdiction

A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

2. Okla. Stat. tit. 15 § 811 (West 1993) provides:

§ 811. Court to confirm award

Upon application of a party to the agreement, the court shall confirm an award, unless

within the time limits imposed herein grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13 of this act.

3. Okla. Stat. tit. 15 § 812 (West 1993) provides:

§ 812. Vacation of award – Grounds

A. Upon application of a party, the court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators are chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section 4 of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 4 of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

4. Okla. Stat. tit. 15 § 813 (West 1993) provides:

§ 813. Modification or correction of award by court – Grounds

A. Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The award is imperfect in a matter of form, not affecting the merits of the controversy; or

3. The arbitrators have made an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.

B. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as modified and corrected. Absent any modification or correction, the court shall confirm the award as made.

C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

D. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements, may be awarded by the court.

STATEMENT OF THE CASE

On August 25, 1993, Respondent, the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi")

presented to Petitioner, C&L Enterprises, Inc., ("C&L") a proposed contract for C&L's construction of the roof upon a bank building on nonreservation, nontrust land owned by Potawatomi (hereafter the "Contract"). Potawatomi's Contract was made upon an American Institute of Architects form agreement chosen by Potawatomi. Potawatomi and/or its architect drafted the contract terms and provisions not set forth in the form. The Contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator or arbitrators shall be final, and *judgment may be entered upon it* in accordance with applicable law in any court having jurisdiction thereof. . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein *shall be specifically enforceable under applicable law in any court having jurisdiction thereof.*

(Pet. App. 46, Article 10.8) (emphasis added).

After execution of the Contract, Potawatomi decided to change the type of roof and entered into a contract with another company in breach of the Contract with C&L. The breach occurred before the bank construction had progressed to the point of installing the roof and prior to C&L being given a notice to proceed under the Contract. C&L gave notice to the architect and

Potawatomi of its damages – lost profits – and its demand for arbitration as provided by the Contract. (Pet. App. 34, Article 2.1).

Potawatomi was represented by counsel and repeatedly corresponded to the American Arbitration Association ("AAA") setting forth its arguments and claimed authorities regarding the factual issues and arguments alleging sovereign immunity from suit. In the arbitration hearing C&L presented exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[1]

After conclusion of the arbitration hearing and consideration of the evidence submitted, the arbitrator rendered its award in favor of C&L in the amount of $25,400.00 plus attorney's fees of $2,230.00, costs of $34.67 and arbitration fees of $750.00. (Pet. App. 61).

C&L sued in the District Court of Oklahoma County to confirm the arbitration award consistent with Oklahoma law and the terms of the arbitration agreement. (Pet. App. 28).

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[1] *See* JT. App. 18-25; Rule 30, American Arbitration Association Construction Industry Arbitration Rules, November 1, 1993 (Record at 47-48).

Potawatomi brought a motion to dismiss the state court action asserting sovereign immunity. C&L responded asserting: that because the Contract between Potawatomi and C&L was executed outside of Indian trust or reservation land, sovereign immunity never attached; that the terms of the arbitration agreement explicitly waived any sovereign suit immunity from arbitration and suit to enforce the Contract; and that the Contract was otherwise properly enforceable by arbitration and state court suit to enforce the arbitration award. (Record at 29-33).

The District Court of Oklahoma County denied Potawatomi's motion to dismiss and denied Potawatomi's subsequent motion to reconsider. (Pet. App. 24-26).

Potawatomi failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety (90) days after delivery of a copy of the Award to Potawatomi as required by 15 Okla. Stat. tit. §§ 812, 813. C&L then filed its Motion for Confirmation of Arbitration Award giving Potawatomi notice of the Motion and scheduled hearing. Potawatomi chose not to appear or otherwise oppose the motion and the trial Court accordingly entered Judgment confirming the Award as mandated by 15 Okla. Stat. tit. § 811. (Pet. App. 21).

C&L later filed original and amended fee applications with detailed supporting time statements. Notwithstanding notice of the application and hearing date, Potawatomi again chose not to appear or otherwise

respond. Judgment granting the application was entered by the Oklahoma County District Court. (Pet. App. 18).

Potawatomi appealed to the Supreme Court of Oklahoma which referred the appeal to the Court of Civil Appeals of Oklahoma. C&L again argued that sovereign immunity never attached and that, assuming sovereign immunity had attached, it was expressly waived by the Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts. Without reaching the question of whether execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Civil Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996).

Potawatomi petitioned this Court for writ of certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721). This Court granted the petition on June 1, 1998 and ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

On remand, the Court of Civil Appeals for the State of Oklahoma, Division 2, addressed the waiver of sovereign immunity issue but nevertheless reversed the judgments of the District Court of Oklahoma County, Oklahoma on February 8, 2000 and denied the C&L's petition for rehearing on March 27, 2000. C&L's petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court was denied May 24, 2000.

Mandate has issued from the Oklahoma Supreme Court but its effectiveness had been suspended pending the resolution of this appeal. (Pet. App. 11).

SUMMARY OF ARGUMENT

This Court has described Indian tribes as "domestic dependent nations" rather than foreign sovereigns. However, the Court has clearly stated that Indian tribes have no greater rights than foreign sovereigns and, indeed, enjoy less than the full attributes of the sovereignty. Therefore, consistent with the rule applied to other sovereigns, the Court should find a waiver of immunity by the explicit terms of the arbitration agreement executed by Potawatomi. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 55, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978).

The Potawatomi waived sovereign immunity from the suit brought by C&L. The waiver of immunity from suit is explicitly stated in the arbitration provisions of the Contract drafted by Potawatomi. The agreement provides for mandatory binding arbitration and states that the arbitration award " . . . shall be final, and judgment may be entered upon it. . . . " (Pet. App. 46, Article 10.8).

As set forth below, other state or federal courts have reviewed similar arbitration provisions involving Indian tribes. Without exception, where the arbitration provisions provided for entry and enforcement of the arbitration award as a "judgment," courts have found a waiver of sovereign immunity from suit to enforce the contract.

Such authorities are consistent with the rule applied to foreign sovereigns.

ARGUMENT

I. Even Accepting That the Potawatomi Generally Enjoy Sovereign Immunity from Suit, They Hold less than the Full Attributes of the Sovereignty Possessed by Foreign Nations and States.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), this Court acknowledged its previous pronouncements that Indian tribes are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754, 118 S.Ct., at 1702.

However, the Court recognized in *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), that all entities enjoying sovereign immunity do not have identical sovereign rights. The Court stated:

> Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.

Id. at 323, 98 S.Ct., at 1086. (citation omitted).

Therefore, a determination of whether sovereign immunity has been waived logically requires consideration of the origin and extent of the immunity enjoyed in the first instance. In *Kiowa*, the Court noted that the

"doctrine of tribal immunity developed almost by accident." *Kiowa,* 523 U.S., at 756, 118 S.Ct., at 1703. The Court acknowledged that, rather than originating by legislative act, the doctrine was birthed from *Turner v. United States,* 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919).

In *Turner,* the Court stated:

> . . . in 1890, [the Indian tribe] . . . then *exercised* within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial.

Id. at 355, 39 S.Ct., at 109. (emphasis added).

Turner did not state that the tribe held or was entitled to hold sovereign immunity from suit. Instead the Court merely recognized that prior to its dissolution the Indian tribe had "exercised" those self-government functions which are typical of a sovereign people. The genesis of the doctrine of tribal sovereign immunity was the language, later quoted from *Turner,* where the Court stated:

> The fundamental obstacle to recovery is *not the immunity of a sovereign to suit,* but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.

Id. at 358, 39 S.Ct., at 110. (emphasis added).

As the Court stated in *Kiowa*:

> The quoted language . . . is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.

Kiowa, 523 U.S., at 757, 118 S.Ct., at 1704.

This Court's analysis of *Turner* rings true. *Turner* may also be read as affirmatively stating that there was no sovereign immunity obstructing recovery. Despite the *Turner* Court's characterizations of the tribe as exercising the powers of a sovereign people and being "like" other governments, "municipal as well as state," it passed over the opportunity to say the tribe had sovereign immunity. Indeed, the only time the Court mentioned immunity was in its statement that sovereign immunity from suit was *not* an obstacle to recovery. *Turner*, 248 U.S., at 358, 39 S.Ct., at 110.

Nevertheless, the judicially created doctrine of tribal immunity stands balanced today on the "slender reed" of *Turner*. In *Kiowa*, the Court recognized that tribal immunity from suit, at least in the context of commercial activities off of the reservation, "extends beyond what is needed to safeguard tribal self-governance." Though the Court was not asked to abrogate tribal immunity and chose to defer to Congress to confine it to on-reservation or noncommercial activities, it did recognize that the Court had taken the lead in drawing the bounds of tribal immunity. Despite its deference, the Court did not say it lacked the power to further restrict the doctrine it had created. *Kiowa*, 523 U.S., at 757, 118 S.Ct., at 1704.

Even without attempting a comprehensive review of case law, a trend is evident. This Court's opinions demonstrate a marked movement away from a view of Indian reservations as distinct nations with full sovereign rights equal to foreign nations, the United States, or individual states, toward broader exertion of jurisdiction over Indian tribes. This is especially apparent in actions concerning commercial activities off of the reservation.

In *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), where the Court reviewed an Alaska Supreme Court decision regarding fishing rights, this Court stated:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation.

Id. at 75, 82 S.Ct., at 571.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973), regarding a tribe's protest of New Mexico's use tax assessment, the Court stated:

> At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction of the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous. . . .
>
> But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake, supra*, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to

> non-discriminatory state law otherwise applicable to all citizens of the State.

Mescalero, 411 U.S., at 147-149, 93 S.Ct., at 1270.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Court again examined the quasi-sovereign status of Indian tribes:

> Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although *no longer 'possessed of the full attributes of sovereignty,'* they remain a 'separate people, with the power of regulating their internal and social relations.'

Id. at 55, 98 S.Ct. 1675. (emphasis added) (citations omitted).

Against this backdrop, the Court in *Kiowa* recognized that "there are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity from suit. *Id.* at 758, 118 S.Ct., at 1704. Considering the judicial genesis of the doctrine of tribal sovereign immunity, the "slender reed" upon which the doctrine is balanced, and the power and practice of this Court to draw increasingly narrow bounds of tribal sovereign immunity, expansion of tribal immunity today would be a significant departure from the course laid by the Court.

This Court would indeed be charting a new course if it were to now condition a waiver of immunity, from suit on a simple contract, upon the incantation of specific words such as advocated by Potawatomi. Past rulings of this Court, of circuit courts of appeal and of state supreme courts outside Oklahoma, counsel adoption of a

standard for waiver which, at most, is no more strict than that applied to foreign sovereigns, states and the United States.

II. The Potawatomi Clearly and Explicitly Waived Sovereign Immunity from Suit to Enforce the Contract.

Potawatomi expressly waived its limited sovereign immunity from suit to enforce the arbitration award when it executed the Contract with C&L. The Contract, an American Institute of Architects form agreement, was prepared and proposed by Potawatomi. The Contract terms and provisions not set out in the form were drafted by Potawatomi and its architect. The Contract contains an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator or arbitrators shall be final, and *judgment may be entered upon it* in accordance with applicable law in *any court* having jurisdiction thereof. . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein *shall be specifically enforceable under applicable law in any court having jurisdiction thereof.*

(Pet. App. 46, Article 10.8) (emphasis added).

In addition, Article 19.1 of the Contract states "[t]he contract shall be governed by the law of the place where

the Project is located." (Pet. App. 56). The project was located off of tribal land, in Shawnee, Oklahoma. (Pet. App. 33)

The Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. 1978 § 802.B., provides:

> The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

Therefore, by the execution of an arbitration agreement within the state of Oklahoma, by specific choice of Oklahoma law and by execution of a contract outside of reservation or trust land but within the State of Oklahoma, it is clear that Oklahoma law governs the contract.

By operation of the Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. 1978 §§ 801-818, and by the terms of the Contract and arbitration agreement, jurisdiction was properly exercised by the Oklahoma State Court.

Where other courts have considered arbitration agreements such as the one at issue here, they have consistently found a waiver of sovereign immunity from suit. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the agreement between the parties contained an arbitration clause with terms virtually identical to the clause at issue herein providing that the agreement:

> . . . shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 758.

Discussing the effect of the arbitration clause, the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the tribe was generally

entitled to sovereign immunity. In addition, the court applied a standard that waivers of sovereign immunity could not be implied but must be unequivocally expressed. *Id.* at 508.[2]

On this foundation, the court turned to the arbitration clause contained in the contract between the parties. Again, the substantive provisions of the clause considered were virtually identical to the provisions of the clause at issue herein. The agreement provided:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id.

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[2] The court cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) as authority for this waiver standard. However, *Santa Clara* quoted the standard from *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976) and *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). Although the authorities cited herein by C&L applied this same standard, and although the waiver at issue herein meets the standard, both *Testan* and *King* were reciting a standard for determining whether the United States has waived sovereign immunity to suit in the specific context of an action in the Court of Claims. Given the distinctions between the sovereign rights of the United States and the quasi-sovereign status of Indian tribes, this Court may determine that a less strict standard for waiver by Indian tribes is appropriate.

The *Val/Del* court cited, with approval, both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, *after agreeing that any dispute would be arbitrated and the result entered as a judgment* in a court of competent jurisdiction, we find that *there was an express waiver of the tribe's sovereign immunity*. . . . Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona. . . .

Val/Del, at 509. (emphasis added).

Both *Val/Del* and *Native Village of Eyak v. GC Contractors* considered arbitration clauses in contracts with Indian tribes otherwise assumed to possess sovereign immunity. The clauses were virtually identical to the arbitration agreement herein and were no more explicit or unequivocal in waiving sovereign immunity. In both cases, the courts specifically found the arbitration agreement was a "clear" "unequivocal" and "express" waiver of immunity.

Later, in *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), the Supreme Court of Alaska reviewed *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (cited below by Potawatomi) as well as its prior ruling in *Eyak*. The court assumed for argument that the appellant CO-OP was entitled to tribal sovereign immunity based upon its historical tribal status. The court went on to state that the CO-OP waived sovereign immunity from suit by entering into an arbitration agreement. *Id.* at 754.

As to *Pan American*, the *Hydaburg* court distinguished it from *Eyak* as follows:

> Unlike *Native Village of Eyak, Pan American* did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, *Pan American* directly attacked the tribe's authority to regulate affairs on its reservation.

Id.

The Potawatomi argue that a waiver must specifically recite the magic words of "waiver," "Indian" and "immunity" and that absent such an incantation, a waiver can only be inferred. No authority stands for this proposition. Indeed, none of the authorities cited by either party supports such a restrictive and mechanical view. As defined by *Black's Law Dictionary*, 1417 (rev. 5th ed. 1979), "Express Waiver" is simply "[t]he voluntary, intentional relinquishment of a known right."

Clearly, the arbitration agreement proposed by Potawatomi and agreed to by both parties constitutes a voluntary, intentional relinquishment of any sovereign immunity from suit to enforce the arbitration agreement or arbitration award.

Despite Potawatomi's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that *"judgment may be entered upon"* the arbitration award and that the arbitration agreement *"shall be specifically enforceable under applicable law in any court having jurisdiction thereof."* The arbitration

clause is clearly an express waiver of immunity by the Potawatomi as was correctly determined by the trial court below.

More recent cases directly on point have echoed the analysis and findings of the authorities discussed above. Indeed, recent authorities are even clearer that language essentially identical to or even less explicit than the arbitration agreement at issue herein does constitute an explicit waiver of sovereign immunity from suit.

In *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not even contain the specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also specifically chosen in the arbitration clause at issue herein) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in *any federal or state court* having jurisdiction thereof.

Id. at 562. (emphasis added).

Responding to protests of the tribe that the agreement only implied a waiver, the Eighth Circuit Court of

Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." *Id.* at 563.

On remand, the district court granted summary judgment to the contractor and entered judgment in the amount of the arbitration award. The tribe appealed and the issue was again addressed in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998). There, the Eighth Circuit Court of Appeals reaffirmed its previous finding that the arbitration clause was an explicit waiver of sovereign immunity from suit.

The Court went on to explain how its decision in *Rosebud Sioux Tribe* was consistent with its previous ruling in *American Indian Agricultural Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, at 1380 (8th Cir. 1985). The court distinguished the two cases stating that in *Standing Rock* the promissory note did not specifically designate an arbitral forum to settle all disputes and did not include a consent to judicial enforcement of the arbitration award. *Val-U Construction* at 577.

A waiver of sovereign immunity from suit by consent to arbitration was also found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, an Indian tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs while the architect proceeded to arbitration seeking recovery for services rendered under the contract.

The arbitration went forward without the tribe's participation resulting in an award in favor of the architect. An action to confirm the arbitration award was stayed

while the court considered whether sovereign immunity had been waived. Again, the arbitration agreement at issue contained language that was virtually identical to the agreement between Potawatomi and C&L. It provided:

> 'Claims, disputes or other matters' arising out of or related to the contract 'shall be subject to and decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association' . . . that the agreement to arbitrate 'shall be specifically enforceable in accordance with applicable law in any court having jurisdiction' and that 'judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.'

Id. at 659.

Considering whether the arbitration agreement was a clear waiver of sovereign immunity, The court stated:

> *There is nothing ambiguous about this language.* The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. *To agree to be sued is to waive any immunity one might have from being sued.*

Id. (emphasis added).

Continuing, the Seventh Circuit Court of Appeals stated:

> The arbitration clause could not be much clearer. . . . No one reading this clause could doubt that the effect was to make the tribe suable. The

> waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a, technical legal term, and anyone who knows what it means can also understand the arbitration clause.

Id. at 660.

III. Finding a Waiver of Immunity by the Agreement to Arbitration is Consistent with the Rule Applied to Other "Sovereigns."

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) the Court reviewed an Indian tribe's suit against the state of Idaho over ownership of the submerged land and bed of a lake. Discussing the state's immunity from suit by the tribe, the Court stated:

> Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity.

Id. at 268, 269, 117 S.Ct., at 2034.

In *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), discussed above, the Alaska Supreme court specifically compared waivers of sovereign immunity by Indian tribes to waivers by foreign sovereigns. The court cited § 456 of the Restatement of the Foreign Relations Law of the United States:

(2) Under the law of the United States:

. . .

(b) an agreement to arbitrate is a waiver of immunity from jurisdiction in

(i) an action or other proceeding to compel arbitration pursuant to the agreement; and

(ii) an action to enforce an arbitral award rendered pursuant to the agreement;[3]

Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b) (1987); *Hydaburg*, at 754.

The court then proceeded to set forth a number of authorities applying this principal to arbitration agreements with foreign sovereigns. While it acknowledged that federal courts have explicitly held Indian tribes are not foreign states, the *Hydaburg* court stated that:

> Nevertheless, the rationale of the cases relating to waiver of immunity by foreign sovereigns is equally applicable to waiver of sovereign immunity by Indian tribes.

Hydaburg, at 754.

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[3] The comment to § 456 states "If a waiver of immunity does not refer to any particular court or place of adjudication, it is treated as applicable to all appropriate courts." Restatement (Third) of the Foreign Relations Law of the United States § 456 comment a (1987). The instant contract chose Oklahoma law. Pursuant to Oklahoma law and the rules of the American Arbitration Association, the arbitration award was enforceable in any state or federal court in Oklahoma.

The Seventh Circuit Court of Appeals in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996), directly addresses the arguments raised by Potawatomi and followed by the Oklahoma Court of Civil Appeals. The *Sokaogon* court stated:

> *The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that.* The examples are not limited to Indian law. When states or the federal government waive sovereign immunity, as in the Federal Tort Claims Act or the Tucker Act, they do not say they are waiving 'sovereign immunity'; they create a right to sue, just as in the arbitration clause here.

Id. (emphasis added).

The Court in *Sokaogon*, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.

As discussed above, the Court has recognized that Indian tribes enjoy less than the full attributes of sovereignty. Therefore, the Seventh Circuit Court of Appeals and the Alaska Supreme Court were correct in looking to foreign relations law for the standard to apply to waivers of tribal sovereign immunity from suit. Indeed, the authorities discussed above support a more liberal standard.

In its Opinion, the Oklahoma Court of Civil Appeals agreed that C&L "makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts." The Court of Appeals went on to state that *Native Village of Eyak, supra,* was directly on point. *See* Pet. App. 5.

Despite conceding that the logic of *Native Village of Eyak* was "unassailable," and that the arbitration agreement and contract language "indicate a willingness on Tribe's part to expose itself to suit on the contract," the Oklahoma Court of Civil Appeals nevertheless found that the "leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *See* Pet. App. 7.

It is simply nonsensical to state that the contract expresses a willingness to be sued but that it does not waive sovereign immunity from suit. It is evident that the Oklahoma Court of Civil Appeals misunderstood the issue and incorrectly followed Potawatomi's argument that a waiver must utter the incantation "we waive sovereign immunity from suit" in order to effectively waive immunity.

The Opinion of the Oklahoma Court of Civil Appeals squarely conflicts with the unanimous opinions of courts having addressed this issue in the context of arbitration agreements with Indian tribes. Opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, Alaska Supreme Court and Arizona Supreme Court have, as discussed above, consistently found an explicit waiver of sovereign immunity from

language essentially identical to or even less explicit than the arbitration agreement at issue herein.

If this agreement – that all claims or disputes "shall be decided by arbitration" and that "judgment may be entered" upon the award – is not a clear and explicit waiver of immunity from suit to enforce an arbitration award, then the contract terms are meaningless. Under this interpretation, an agreement to have a judgment entered would not include an agreement to be sued and an agreement to be bound by an arbitration award would not include an agreement to submit to arbitration.

Potawatomi's argument raises the obvious question: what specific language is required? If the words "we waive sovereign immunity" are required, then every court other than the Oklahoma Court of Civil Appeals is not following such a rule.

Finally, Potawatomi attempts to establish that not only are its contracts unenforceable, but even its agreements to arbitrate disputes are meaningless. Although likely to be dismissed by Potawatomi as "unsolicited paternalism," C&L submits that Potawatomi's argument is shortsighted and in direct conflict with federal policy promoting economic advancement and assimilation of Indians as full and equal participants in commerce.

CONCLUSION

The Court should reverse the judgment of the Oklahoma Court of Civil Appeals and remand with instructions to affirm the previous judgments of the District Court of Oklahoma County.

Respectfully submitted,

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(5)

Supreme Court, U.S.
FILED

DEC 14 2000

OFFICE OF THE CLERK

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

JOINT APPENDIX

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08/08/1996 ORDER (COPY FROM UNITED STATES DISTRICT COURT) R:1811F:1801

08/08/1996 ORDER/CONTINUANCE GRANTED/ HOWARD R:1811 F:1798

08/08/1996 ENT: CLAIM EXEMPT - RESET B/A 8/19/96 @10AM - HOWARD

08/08/1996 MOTION FOR CONTINUANCE

08/08/1996 ORDER/(COPY FROM UNITED STATES DISTRICT COURT) R:1811F:1799

* * *

08/19/1996 ENT:CLAIM EXEMP - O/R - HOWARD

08/19/1996 ENT: CLAIM EXEMP - UNDERADVISEMENT - HOWARD

08/19/1996 ORDER DETERMINING CLAIM FOR EXEMPTION & DIRECTING DISTRIBUTION OF FUNDS/HOWARD

08/20/1996 MOTION FOR APPROVAL OF SUPER-SEDEAS BOND & SUPPORTING BRIEF

08/26/1996 MOT OR APPLIC FOR CONTEMPT CIT - POST-JE

* * *

08/26/1996 ORDER FOR CITATION ISSUED - PPS

08/26/1996 HEARING 9-04-96 10AM WRIGHT

* * *

08/27/1996 ORD FOR H.O.A. SVD/FIRST NATL BK OF SHAWNEE BY SVG JAMES R HAYDEN EXECUTIVE VICE PRESIDENT NPRS ON 8-26-96 R:1818F:1409

* * *

08/28/1996 OBJECTION TO DEFT'S MOTION FOR APPROVAL OF SUPERS DAS BOND AND BRIEF IN OPPOSITI THERTO

* * *

08/29/1996 REPLY TO DFT'S OBJECTION TO APPROVAL OF SUPERSEDEA BOND

08/29/1996 ENT:1 BOUND RECORD AND 1 SUPPLEMENTAL BOUND RECORD TRANSMITTED TO THE SUPREME CRT/SC #86569

08/30/1996 ENT:MOT FOR APPROVAL OF SUPER-SEDEAS BOND OVERRULED ALL AS PER JE/BLEVINS

* * *

09/04/1996 JOURNAL ENTRY/DFTS MOTION FOR APPROVAL OF SUPER-SEDEAS BOND/ BLEVINS

09/05/1996 ENT: HOA CONT TO 9/11/96 @10AM BEFORE JUDGE WRIGH

09/05/1996 SUPERSEDEAS BOND/BLEVINS R:1820 F:3978

09/11/1996 ENT: HOA STR - WRIGHT

* * *

11/06/1996 MOTION OF APPELLEE FOR JUDGMENT UPON SUPERSEDEAS BOND & MOTION OF APPELLEE FOR ATTORNEY'S FEES AND COSTS FOR SERVICES PERFORMED ON APPEAL/SC #86568

01/29/1997 ORDER & JUDGMENT ON SUPERSEDEAS BOND (COPY FROM SUPREME COURT) R:1864F:1000

03/12/1997 MANDATE AFFIRMED R:1878 F:1837

08/04/1997 ENT:1 BOUND RECORD RETURNED FROM THE SUPREME COURT

* * *

01/07/2000 2 BOUND RECORDS TRANSMITTED TO THE SUPREME COURT SC#86568

01/10/2000 ORDER/SUPREME COURT SC#86568 R:2216 F:2075

06/23/2000 MANDATE/REVERSED & REMANDED WITH INSTRUCTIONS SC#86568 R:2273 F:4415

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

10/27/1995	J.E. OF J'MENT FILED
	* * *
11/27/1995	CERTIFICATE OF APPEAL ISSUED
11/27/1995	PETITION IN ERROR
	* * *
12/15/1995	RESPONSE TO PETITION
	* * *
12/19/1995	AMENDED DESIGNATION OF RECORD
03/27/1996	NOTICE OF COMPLETION W/INDEX ATTACHED
04/17/1996	AMENDMENT TO PETITION IN ERROR
05/07/1996	RESPONSE TO AMENDED PETITION IN ERROR
05/07/1996	APPELLEE AGREEABLE TO SETTLEMENT CONFERENCE
05/24/1996	BRIEF OF APPELLANT
07/03/1996	APPELLEE'S ANSWER BRIEF
07/23/1996	REPLY BRIEF OF APLNT
08/16/1996	RECORD ORDERED FROM DISTRICT COURT
08/28/1996	2 VOLS. ORIG. RECORD OF 125 PGS.
09/30/1996	CAUSE ASSIGNED TO COA-TULSA
10/10/1996	STANDS ASSIGNED TO COA-DIV. 2
11/05/1996	JE: ----- MEMO OPIN ----- AFFIRMED ----- STUBBLEFIELD, J. CONCUR:GOODMAN,

PJ, BOUDREAU, J. ----- SUMMARY ----- C/ATTYS & DC JUDGE

11/05/1996 AFFIRMED; MEMO OPIN

11/06/1996 MOTION OF APLEE FOR JUDGMENT UPON SUPERSEDEAS BOND & MOT OF APLEE FOR ATTY FEES & COSTS COA/ TULSA

11/22/1996 APLNTS RESP TO MTN OF APLEE FOR JUDGMENT UPON SUPERSEDEAS BOND & MTN OF APLEE FOR ATTNY FEES & COSTS FOR SERVICES PERFORMED ON APPEAL COA/TULSA

11/22/1996 APPELLANT'S PETITION FOR CERTIORARI ($) COA/TULSA

12/05/1996 ANSWER TO PETITION FOR CERTIORARI

01/27/1997 JE: ** ATPC DENIED ** APLEE MTN FOR APPEAL-RELATED COUNSEL FEE GRANTED, ETC. FOLLOWING ISSUANCE OF MANDATE TRL CRT AUTHORIZED TO DETERMINE AMOUNT OF APPEAL-RELATED COUNSEL FEE TO BE AWARDED TO APLEE IN ADVERSARIAL HEARING AFTER PROPER NOTICE APLEES MTN FOR JUDGMENT ON SUPERSEDEAS BOND GRANTED, ETC. AMOUNT OF $28,499.63 PLUS $11,077.39 W/INT AT STATUTORY RATE FROM 10-27-95 & FROM 3-21-96 RESPECTIVEL UNTIL PAID, ETC. DIST CRT DIRECTED TO ENFORCE JUDGMENT AS IF RENDERED IN THAT COURT. CONCUR: HODGES, LAVENDER, SIMMS, HARGRAVE, WILSON, WATT, JJ. CONCUR IN DENYING CERT; CONCUR IN PART & DISSENT IN PART FROM COUNSEL-FEE

AWARD JUD ON SUPERSEDEAS BOND, ETC.: OPALA, J. DISSENT: KAUGER, CJ, SUMMERS, VCJ. C/ATTNYS, DC CRT CLK, COA/TULSA

01/30/1997 MOTION TO SUSPEND EFFECTIVENESS OF MANDATE

02/04/1997 JE: APLEE DIRECTED TO RESPOND TO MTN TO SUSPEND EFFECTIVE- NESS OF MANDATE W/IN 10 DAYS OF DATE OF THIS ORDER N/ATTNYS

02/13/1997 OBJECTION TO MOTION TO SUSPEND EFFECTIVIENESS OF MANDATE

03/03/1997 JE: APLNT'S MOT TO SUSPEND EFFECTIVENESS OF MANDATE GRANTED. MANDATE SH/ISSUE BUT ITS ENFORCEMENT SH/BE STAYED TIL PET FOR CERT IS FILED W/USSC & FOR SO LONG THEREAFTER AS CERT IS PENDING IN THAT CT. APLNT DIRECTED TO NOTIFY TH/CT OF FILING OF ITS PET FOR CERT. CONCUR: KAUGER, CJ, HODGES, LAVENDER, HARGRAVE, OPALA, WILSON, JJ. C/ATTYS **** ADD TO MANDATE ***

03/07/1997 MANDATE ISSUED *** WITHDRAWN PER ORDER OF 1-7-00 ***

* * *

04/22/1997 NOTICE OF FILING PET FOR CERT (W/ USSC)

05/05/1997 LTR F/USSC- CERT FILED 4-25-97

05/22/1997 RECORD RECEIVED FROM COA/TUL

07/23/1997 RECORD RETURNED TO DISTRICT COURT

06/08/1998 LTR FR/USSC DATED 6-1-98 RE:CERT GRANTED & JUDGMENT VACATED & RMND TO CCA

07/06/1998 LTR FR/USSC DATED 7-1-98 W/CERTIFIED COPY OF JUDGMENT & COPY OF OPIN OF THIS CRT. COPY RETURNED THIS DATE

* * *

01/07/2000 JE: MANDATE ISSUED 3-7-97 IS W/DRAWN, RECORD IS ORDERED TRANSMITTED TO CCA TULSA, DIV 2 PURSUANT TO ORDER OF USSC. C/ATTYS, DC CLK, DC JUDGE, COA/TULSA

01/07/2000 Assigned to Court of Civil Appeals, Tulsa (PER ABOVE ORDER OF 1-7-00)

01/11/2000 1 volume Original Record – 94 pages; 1 volume Supplement to the Original Record – pages 95 through 125

01/11/2000 Record to CCA-TUL

01/14/2000 JE: PARTIES SH/TAKE NOTICE THAT B/C APPOINTMENT OF BOUDREAU, J. TO SUP CT, REIF, J., H/BEEN APPOINTED TO SIT ON TH/APPEAL. PANEL OF TH/CASE, UPON REMAND, SH/CONSIST OF GOODMAN, CJ., STUBBLEFIELD, J., & REIF, J. C/ATTYS

02/03/2000 MOTION OF APLEE FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES OR SUPPLEMENTAL BRIEF COA/TULSA

02/08/2000 JE: OPIN ------ REVERSED & REMANDED W/ INSTRUCTIONS ----- STUBBLEFIELD,

J. CONCUR: GOODMAN, CJ, REIF, J. ----- SUMMARY ------ C/ATTYS & DC JUDGE

02/08/2000 Reversed and Remanded with Instructions (Opinion)

02/28/2000 MTN TO EXONERATE OR DISCHARGE BOND & MTN FOR ENFORCEMENT–OF AWARDED APPEAL RELATED COSTS COA/TULSA

02/28/2000 Appellee's Petition for Rehearing COA/ TULSA

03/14/2000 APLEE'S OBJECTION TO APLNT'S MTN TO EXONERATE OR DISCHARGE BOND, ETC. COA/TULSA

03/23/2000 REPLY TO APELES OBJECTION TO APLNTS MOTION TO EXONERATE OR DISCHARGE BOND ADN ENFORCE APPEAL-RELATED COSTS COA/TULSA

03/27/2000 JE: APLEE'S MTN TO SUPPLEMENT AUTHORITIES DENIED B/C OPIN WAS FILED 2-8-00. *** AEPR DENIED *** SUPER BOND ORDERED EXONERATED & CLK OF APP CT TO TAX ALL COSTS AGAINST APLEE. N/ATTYS, DC JUDGE, DC CLK & OBJ *** add to mandate- $300.00 costs ***

04/17/2000 Appellee's Petition for Certiorari ($ OC) COA/TULSA

04/24/2000 ORGR received from CCA-TUL

04/28/2000 ANSWER TO APLEE'S PET FOR CERT

05/08/2000 REPLY TO APLNT'S ANSWER TO APLEE'S PET FOR CERT

05/24/2000	JE: *** AEPC DENIED *** CONCUR: SUMMERS, CJ, KAUGER, BOUDREAU, JJ; CONCUR BY REASON OF STARE DECISIS: WATT, WINCHESTER, JJ; DISSENT; HARGRAVE, VCJ, HODGES, LAVENDER, OPALA, JJ. N/ATTYS
05/26/2000	MOTION TO SUSPEND EFFECTIVENESS OF MANDATE
05/31/2000	JE: APLNT DIRECTED TO RESPOND BY 6-5-00 TO APLEES MOTION TO SUSPEND EFFECTIVENESS OF MANDATE. N/ATTNYS
06/05/2000	RESPONSE TO APLEE'S MTN TO SUSPEND EFFECTIVENESS OF MANDATE
06/09/2000	JE: MANDATE SH/ISSUE BUT ITS EFFECTIVENESS SH/BE SUSPENDED PENDING FILING OF PET FOR CERT I/USSC OR EXPIRATION OF TIME TO FILE. N/ATTYS, CLK
06/14/2000	Mandate Issued
06/22/2000	Record Returned to District Court
06/26/2000	Receipt for Mandate
08/28/2000	LTR DATED 8-24-00 FR/USSC RE: PET FOR CERT FILED AS CASE NO. 00-292
11/03/2000	Letter dated 10-30-00 from USSC --- Petition for Writ of Certiorari is granted.

PLAINTIFF'S EXHIBIT B

CONSTRUCTION CHANGE DIRECTIVE

AIA DOCUMENT G714

(Instructions on reverse side. This document replaces AIA Document G713, Construction Change Authorization.)

OWNER	[ ]
ARCHITECT	[ ]
CONTRACTOR	[X]
FIELD	[ ]
OTHER	[ ]

PROJECT:	New Bank Building for First Oklahoma Bank Shawnee, Oklahoma (name, address)
TO CONTRACTOR:	Citizens Band Potawatomi Tribe 1901 S. Gordon Cooper Drive Shawnee, OK 74801 Attn: Mr. Bob Dunning (name, address)
DIRECTIVE NO:	One (1)
DATE:	March 14, 1994
ARCHITECT'S PROJECT NO:	9202
CONTRACT DATE:	N/A
CONTRACT FOR:	General

You are hereby directed to make the following change(s) in this Contract:

Item #1

Omit glass and frames at second floor railing. Run ceiling through at detail JJ-A6.

Completely encase columns in oak similar to detail OO-A6.

Item #2

Omit foam roofing. Furnish single ply EPDM 60 mil fully adhered roofing. Adjust metal flashing as required. (See attached specifications).

PROPOSED ADJUSTMENTS

1. The proposed basis of adjustment to the Contract Sum or Guaranteed Maximum Price is:

   [ ] Lump Sum (increase) (decrease) of $ _____.

   [ ] Unit Price of $ _____ per _____.

   [ ] as provided in Subparagraph 7.3.6 of AIA Document A201, 1987 edition.

   [XX] as follows:

2. The Contract Time is proposed to (~~be adjusted~~) (remain unchanged). The proposed adjustment, if any, is (an increase of N/A days) (a decrease of N/A days).

When signed by the Owner and Architect and received by the Contractor, this document becomes effective IMMEDIATELY as a Construction Change Directive (CCD), and

the Contractor shall proceed with the change(s) described above.

The Price Group Architects	Citizens Band Potawatomi Tribe
ARCHITECT	OWNER
14 East 9th Street	1901 S. Gordon Cooper Drive
Address	Address
Shawnee, OK 74801	Shawnee, OK 74801
BY /s/ Donald M. Price	BY /s/ Robert F. Davis
DATE 3-14-94	DATE 3-14-94

Signature by the Contractor indicates the Contractor's agreement with the proposed adjustments in Contract Sum and Contract Time set forth in this Construction Change Directive.

Citizen Band Potawatomi Tribe
CONTRACTOR
1901 S. Gordon Cooper Drive
Address
Shawnee, OK 74801
BY /s/ R. Dunning
DATE 3-15-94

AIA DOCUMENT G714 • CONSTRUCTION CHANGE DIRECTIVE • 1987 EDITION • AIA • © 1987 • THE AMERICAN INSTITUTE OF ARCHITECTS, 1735 NEW YORK AVENUE, N.W. WASHINGTON, D.C. 20006

PLAINTIFF'S EXHIBIT C

MICHAEL MINNIS & ASSOCIATES, P.C.
ATTORNEYS AT LAW
LIBERTY TOWER, SUITE 3160
100 NORTH BROADWAY
OKLAHOMA CITY, OKLAHOMA 73102-8606
MICHAEL MINNIS TELEPHONE (405) 235-7686
DAVID McCULLOUGH TELECOPIER (405) 232-5460

February 7, 1995

American Arbitration Association
14402 Galleria Tower
13455 Noel Road
Dallas, TX 75240-6620

C & L Enterprises, Inc.
c/o Garvin, A.G. Carlton & Mashburn
ATTN: John Mashburn, Esq.
2100 City Place
204 North Robinson
Oklahoma City, OK 73102

RE: 71 E 110 0024 95 – C&L Enterprises, Inc., Request for Arbitration

Dear American Arbitration Association:

We are attorneys for the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi"). In that capacity, we have been asked to respond to your January 30 letter. C&L Enterprises, Inc. has requested arbitration concerning their claim against the Potawatomi under a putative contract dated August 25, 1993. This contract is

void and unenforceable for a number of reasons including the following:

1. **Sovereignty.** As a sovereign Indian Nation, the Potawatomi are immune from suit. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991).

2. **Section 81 Approval.** No contract with an Indian tribe is enforceable unless endorsed with the approval of the Secretary of the Interior. 25 U.S.C.A. § 81. The putative C&L contract is not so endorsed.

3. **Lack of Authority.** The putative C&L contract was not signed with appropriate authorization under the Potawatomi constitution. *See, e.g.,* Pot. Const., art. 18, § 2.

4. **Condition Subsequent.** In any event, the putative C&L contract was voided by the occurrence of a condition subsequent. C&L was originally awarded the "contract" as the low bidder to construct a "Perlite Board Foam Insulation" roofing. However, the contract authorized change orders. *Contract,* p. 8, art. 13. The architect determined that the type of roofing should be changed. C&L was not qualified to construct this new roof. Accordingly, new bids were solicited. C&L submitted a new bid at $6,000 less than its original bid. C&L's offer was not accepted because not the low bid and because C&L violated the bidding requirements that preclude the bidder from relying on a subcontractor as C&L did in submitting the subsequent bid.

5. **Architect Approval.** No payments were due until C&L invoices were certified by the architect. *Contract,* p. 7, art. X, ¶ 10.4. The architect did not review and certify

any payments for C&L invoices. Further, the architect had the duty to make the initial decision on all claims under the contract. *Id.* ¶ 10.5. The architect has not made any initial decision in C&L's favor.

6. **No Consideration.** The low bidder (Harry Coates Company, Inc.) was accepted, constructed the roof, and has been paid by the Potawatomi.

Because the C&L request for arbitration is based on a void and unenforceable contract, the arbitrator should not enter any award to C&L.

This response is not intended as an acquiescence to arbitration nor a waiver of any rights or defenses. It is being made solely to apprise the arbitrator of the Potawatomi position and to preserve any and all defenses to the C&L claim.

Very truly yours,

MICHAEL MINNIS & ASSOCIATES, P.C.

/s/ Michael Minnis
Michael Minnis

MM/djp

cc: J.D. Colbert, Potawatomi Tribal Administrator
Price Group Architects and Planners
14 East 9th
Shawnee, OK 74801

PLAINTIFF'S EXHIBIT D

MICHAEL MINNIS & ASSOCIATES, P.C.
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MICHAEL MINNIS TELEPHONE (405) 235-7685
DAVID McCULLOUGH TELECOPIER (405) 232-5460

March 17, 1995

American Arbitration Association
ATTN: Tracey L. Hegeman
Commercial Supervisor
14402 Galleria Tower
13455 Noel Road
Dallas, TX 75240-6620

RE: 71 E. 110 00024 95
C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma
L.U.

Dear Supervisor Hegeman:

In your March 7 letter concerning the above-described matter you asked for a response to your "letter of January 30, 1995." As noted in our original correspondence dated February 7, the Citizen Band Potawatomi Indian Tribe of Oklahoma has no intention of participating in arbitration, has not waived sovereign suit immunity, and has no intention of waiving sovereign suit immunity.

In his March 1 letter, John Mashburn cites several cases as putative support for arguments made therein.

These citations of authority do not support Mr. Mashburn's assertions.

For example, Mashburn claims that suit immunity does not protect a tribe engaging in business activity and therefore a "tribe may be sued for breach of a written contract arising out of such conduct, regardless of where the contract was executed." Mashburn relies on a partial quote from 42 C.J.S. § 19a (1991) which in turn cites *Padilla v. Pueblo of Acoma*, 754 P.2d 845, *cert. denied*, 490 U.S. 1029 (1989) (in light of disfavor of sovereign immunity in New Mexico common law, exercise of jurisdiction over tribe for off-reservation conduct allowed as "solely a matter of comity"). A recent Texas federal judge put the *Padilla* case in perspective: "The court's research has led it to the conclusion that the *Padilla* approach is generally rejected outside of the court of that state." *Elliott v. Capital International Bank & Trust*, 870 F.Supp. 733, 734 (E.D. Tex. 1994); *see also in re Greene*, 980 F.2d 590, 594-95 (9th Cir. 1992) *cert. denied*, 114 S.Ct. 681 (1994).

Mashburn also cites *Oklahoma Tax Commission v. Potawatomi*, 111 S.Ct. 905 (1991), but the holding in this case is contrary to his arguments. In this suit, the Supreme Court reiterated prior holdings that tribes are immune from suit. "Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Id.* at 909. (citations omitted).

The sovereign suit immunity of Indian tribes derives from the federal suit immunity and like the former is not dependent on the place where the putative claim arose.

The cases cited from Alaska have no application to Indian tribes in Oklahoma. Alaskan tribes have a relationship to the federal government unique to Alaska and unrelated to the treaties and reservations that are part of the history of the Indians in the continental United States. The Alaskan Indians are organized as "corporations" or "villages." In any event, we urge you to review the authorities yourself.

Very truly yours,

MICHAEL MINNIS & ASSOCIATES, P.C.

/s/ Michael Minnis
Michael Minnis

MM/djp

cc: J.D. Colbert, Potawatomi Tribal Administrator
John Mashburn, Esq.
Price Group Architects and Planners
14 East 9th
Shawnee, OK 7480 [sic]

PLAINTIFF'S EXHIBIT E

MICHAEL MINNIS & ASSOCIATES, P.C.
ATTORNEYS AT LAW
LIBERTY TOWER, SUITE 3160
100 NORTH BROADWAY
OKLAHOMA CITY, OKLAHOMA 73102-8606
MICHAEL MINNIS TELEPHONE (405) 235-7686
DAVID McCULLOUGH TELECOPIER (405) 232-5460

May 12, 1995

American Arbitration Association
ATTN: Tracey L. Hegeman
Commercial Supervisor
14402 Galleria Tower
13455 Noel Road
Dallas, TX 75240-6620

NOTICE

RE: 71 E. 110 00024 95
C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma
L.U.

Dear Supervisor Hegeman:

In your May 8 letter, you advised "that the Association has made an administrative appointment of Mr. Peter Bradford" and stated that any objections to this appointment were to be filed with the Association no later than May 18, 1995.

As noted in previous correspondence, the Citizen Band Potawatomi Indian Tribe of Oklahoma does not have a valid, enforceable contract with C&L Enterprises,

Inc. and, accordingly, the arbitration provisions referenced therein have no legal sanction. Further, the Potawatomi are immune from suit. The Potawatomi have not waived suit immunity nor do they have any intention of doing so. C&L has provided no goods or services to the Potawatomi for which C&L is entitled to compensation.

You are further advised that the Potawatomi have no intention of appearing before Mr. Bradford or anyone else appointed by the Association in this matter, nor any intention of paying any arbitration fee.

Very truly yours,

MICHAEL MINNIS & ASSOCIATES, P.C.

/s/ Michael Minnis
Michael Minnis

MM/djp

cc: J.D. Colbert, Potawatomi Tribal Administrator
John Mashburn, Atty, C&L Enterprises, Inc.
Peter B. Bradford, Esq.

JAN 16 2001

Supreme Court, U.S.
FILED
JAN 16 2001
OFFICE OF THE CLERK

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

BRIEF FOR RESPONDENT

MICHAEL MINNIS, OBA #6251
Counsel of Record
DAVID MCCULLOUGH, OBA #10898
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OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Does a paragraph authorizing arbitration in an 11-page form agreement not tailored in any way for an Indian tribe and signed by tribal officials (without actual authorization or subsequent ratification by the tribal government) that is relative to their lands, constitute, without more, a valid and unequivocally expressed waiver of tribal sovereign immunity?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States,

unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any

court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 177. Purchase or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Citizen Potawatomi Nation Const., art. VII.[1]

Section 1. There shall be a Business Committee which shall consist of the Executive Officers as provided in Article 6, and two Councilmen who shall serve for four year terms and until their successor be qualified and installed in office.

Section 2. Subject to any limitations in this Constitution, and except for those powers expressly reserved to the Citizen Band Potawatomi Indian Council by this Constitution, or delegated to another tribal entity by this Constitution, the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Band Potawatomi Indian Tribe of Oklahoma in all matters on which the Tribe is empowered to act now or in the future including the authority to hire legal counsel to represent the Tribe, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.

C.P.N. Const., art. XVIII.

Section 1. All final decisions of the Council on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Council shall begin

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[1] On February 29, 1996, the Potawatomi ratified an amendment to the constitution changing the name of the tribe from "Citizen Band Potawatomi Indian Tribe of Oklahoma" to "Citizen Potawatomi Nation." However, references elsewhere in the constitution using the old name were not amended.

with the words, "Now, therefore be it resolved by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 2. All final decisions of the Business Committee on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Business Committee shall begin with the words, "Now, therefore be it resolved by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 3. All final decisions of the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with the words, "Be it enacted by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 4. All final decisions of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with the words, "Be it enacted by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

STATEMENT OF THE CASE

Consistent with a July 25, 1993, proposal,[2] C&L Enterprises, Inc. ("C&L"), Petitioner, signed an "Abbreviated Form of Agreement Between Owner and Contractor" (1987 edition)[3] copyrighted by the American Institute of Architects (hereafter "AIA Agreement") to construct for $85,000 a foam roof on a building located on land owned by the Citizen Potawatomi Nation ("Potawatomi").[4] This document was dated August 25, 1993, and was also signed by three Potawatomi tribal officials.[5] However, the AIA Agreement was never approved nor otherwise authorized by the Potawatomi Business Committee.[6] Under the AIA Agreement, construction on the foam roof was not to begin until a "notice to proceed" was issued

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[2] App. 59 ("Proposal").

[3] App. 32 ("Plaintiff's Exhibit A").

[4] Although not held in trust by the United States, this land cannot be alienated without the consent of the United States, *i.e.*, the land is restricted. 25 U.S.C. § 177. *See, e.g., Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996).

[5] John A. Barrett, Jr., Chairman, Bob F. Davis, Secretary/Treasurer, and Hilton Melot, Councilman, were at the time three of the five members of the Citizen Potawatomi Nation Business Committee. C.P.N. CONST., art. VII, § 1.

[6] The Potawatomi Business Committee is the tribal governing body constitutionally authorized to "enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation." C.P.N. CONST., art. VII, § 2. The Business Committee acts by adopting ordinances and resolutions. *Id.* art. XVIII. The record contains no tribal resolutions or other evidence that the Business Committee ever took any action on the AIA Agreement.

by the project architect (App. 49, p. 2, art. 2, ¶ 2.1). A notice to proceed with construction never issued.[7]

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubber guard, not foam. Consistent with that determination and the AIA Agreement,[8] on March 14, 1994, the architect issued a "Construction Change Directive."[9]

On April 19, C&L "offered to reduce the contract sum by $6,600."[10] Because C&L could not build a rubber guard roof,[11] C&L simultaneously obtained a bid from another contractor to construct a rubber guard roof for $53,400. The Potawatomi rejected C&L's offer to have another contractor build the roof for $78,400 because C&L would not be performing the work[12] and because C&L was asking $21,616 more than the contractor who submitted the lowest bid and ultimately constructed the rubber guard roof for $56,784.

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[7] Cert. Pet. 7; C&L Br. at 6.

[8] *See* App. 49, p. 8, art. 13.

[9] JT. App. 15.

[10] *See* "Objection to Defendant's Motion to Dismiss and Brief in Opposition Thereto" at 2 [*C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct.) (filed Sept. 11, 1995)].

[11] *Id.*

[12] The AIA Agreement (art. 11, ¶ 11.2) contemplates that the contractor will use "subcontractors" (plural), but did not reasonably contemplate a contractor would use a single subcontractor to perform all the work. App. 47. In any event, under the AIA Agreement, the owner had to approve the subcontractors. *Id.* C&L's subcontractor was never approved.

The record contains no evidence that C&L ever took any action with regard to the AIA Agreement other than locating a contractor to construct a roof materially different from that described in the AIA Agreement. C&L never performed any work on the roof.[13] The record does not contain any evidence that C&L ever submitted, or that the project architect ever rejected, any invoices under the contract for materials purchased, payments made or work performed.[14] Nor has C&L submitted any evidence of lost opportunities or any other evidence of damage. By its own admission, C&L's only claim for damages was for "lost profit" on a job never commenced.[15]

On January 24, 1995, C&L submitted the AIA Agreement to an arbitrator. Upon receiving notice of the arbitration, the Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim,[16] but had no intention of waiving immunity by participating in the arbitration proceedings.

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[13] Cert. Pet. at 7; C&L Br. at 6.

[14] "Objection to Defendant's Motion to Dismiss and Brief in Opposition Thereto," *supra*, at 2-3.

[15] Cert. Pet. at 7; C&L Br. at 7.

[16] The Potawatomi advised the arbitrator that the AIA Agreement "is void and unenforceable for a number of reasons including" sovereign immunity, lack of a 25 U.S.C. § 81 endorsement, lack of tribal authorization, failure of a condition subsequent, lack of approval from the architect, and lack of consideration. JT. App. at 19-20.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign immunity nor discuss the other legal deficiencies noted in the letter from the Potawatomi, nor explain how the amount of the award was computed. App. 61. C&L has subsequently stated[17] that its damages were $31,600, the difference between the original C&L proposal for the foam roof ($85,000) and the amount ($53,400) that C&L's putative subcontractor would have charged to construct the rubber guard roof.

In other words, C&L's claim for damages was not based on expenses incurred by C&L in preparing to construct the foam roof nor on the profits C&L would have allegedly lost if the AIA Agreement had been fulfilled, but rather simply on the differential between the contract price and what a third party would charge to construct a different roof. The arbitration award was apparently based on the differential between C&L's offer to reduce the contract price to $78,600 and the subcontractor's offer to construct the roof for $53,400.[18] Essentially, the arbitrator awarded C&L a finder's fee of 48 percent based on a proposal never accepted. C&L was awarded $25,400 for finding a contractor to construct the roof for $53,400.

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[17] *See, e.g.*, "Answer Brief of Appellee" at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[18] The difference between the C&L's offer to lower the price to $78,600 and the subcontractor is $53,000 or $400 less than the arbitration award.

On August 7, C&L filed suit[19] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to dismiss based on sovereign suit immunity.[20]

Without a hearing, the District Court denied the Potawatomi motion to dismiss (App. 25) and a subsequent motion for reconsideration. App. 24. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[21]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default judgement against the Potawatomi for $28,414.67. App. 21. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[22] and the Potawatomi appealed to the Oklahoma Supreme Court.[23]

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[19] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) ("Petition for Confirmation of Arbitration Award"). App. 28.

[20] App. 26. In the supporting brief, the Potawatomi raised both sovereign immunity and the 25 U.S.C. § 81 deficiency. *See* "Brief in Support of Motion to Dismiss," at 5, n. 17 (filed Aug. 25, 1995).

[21] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

[22] *See id.* at Order, Dec. 13, 1995.

[23] The Potawatomi asserted, *inter alia*, that the District Court erred by purporting to exercise jurisdiction over an

On March 21, 1996, C&L obtained a second default judgment from the District Court for an additional $10,545 in attorney's fees and costs.[24]

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[25] directly controls on the issue of tribal immunity"[26] and that the Potawatomi waived any other defects in C&L's cause of action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 14-15.

The Potawatomi petition to the Oklahoma Supreme Court for review by *certiorari* was denied January 27, 1997. App. 16. On June 1, 1998, this Court granted the Potawatomi petition for *certiorari*, vacated the judgment

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unconsenting Indian tribe and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See* "Brief of Appellant," at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

[24] App. 18. This judgment was also appealed. Most of the work allegedly supporting C&L's fees was performed post-judgment in other litigation. Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L. Of the fees awarded, 72% ($7,620) were for services allegedly performed post-judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgment entered by the District Court.

[25] *Hoover v. Kiowa Tribe*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 517 U.S. 1188 (1996).

[26] App. 14. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

of the Oklahoma Court of Civil Appeals and remanded the case "for further consideration in light of *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. [751 (1998)]." *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, 524 U.S. 901 (1998). App. 8.

On February 8, 2000, the Court of Civil Appeals, Division 2, after further consideration, issued an opinion reversing the judgment of the District Court for C&L because:

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.
>
> We conclude that the record does not support a finding of express waiver of immunity on the part of the Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgment of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991, § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

App. 7 (footnote omitted). The case was remanded with instructions to sustain the Potawatomi motion to dismiss filed August 25, 1995.

After the Oklahoma Supreme Court denied C&L's petition for certiorari on May 24, 2000, C&L petitioned this Court for review by certiorari. On October 30, an order was entered granting certiorari.

SUMMARY OF THE ARGUMENT

The February 8, 2000, Opinion of the Oklahoma Court of Civil Appeals (hereafter, "the opinion below") should be affirmed because it is consistent with this Court's sovereign immunity jurisprudence as expressed recently in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) and in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). An arbitration clause is not a waiver of immunity from suit. A single paragraph authorizing arbitration in an 11-page, fine print form contract not tailored in any way for an Indian tribe nor signed by any party with actual tribal authority is not an "unequivocal express[ion]" of a waiver from suit, as required by this court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

A 1993 agreement purportedly with an Indian tribe "relative to their lands" that is not endorsed by the Secretary of the Interior is "null and void." *See* 25 U.S.C. § 81. A null and void contract, even one containing an arbitration paragraph, cannot effect a waiver of tribal suit immunity. Congress' enactment of and recent amendment

to section 81 certainly evinces legislative support for this Court's requirement that waivers of tribal sovereign immunity be "unequivocally expressed."

Finally, the laws governing foreign sovereign immunity are not applicable directly or by analogy to Indian tribes. In any event, the application of these laws to this case would not support reversal of the opinion below.

ARGUMENT

C&L's argument begins with a discourse from which one is to infer that the doctrine of tribal sovereign immunity has been gradually diminished by judicial decisions, has outlived its usefulness, and should be administered the *coup de gras* here. This is an audacious suggestion under the circumstances of this relatively insignificant contract case. More importantly, it is based on an inaccurate premise. Although some state courts have sought to diminish tribal sovereign immunity,[27] this Court has consistently upheld it.[28] During the last 10 years, this Court has reiterated the doctrine in at least three cases.

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[27] *See, e.g., Hoover v. Kiowa Tribe, supra.*

[28] "In 1940, the United States Supreme Court declared that immunity from suit was part of the retained sovereignty of Indian tribes. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653 (1940). **This aspect of tribal sovereignty has been repeatedly upheld and expanded over the past 59 years** on the belief that tribal immunity is 'necessary to preserve the autonomous political existence of tribes and to preserve tribal assets.' *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985)." *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 839

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe v. Manufacturing Technologies, 523 U.S. at 760.

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996).

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

Under this Court's consistent sovereign immunity jurisprudence, tribal sovereign immunity must be clearly abrogated by Congress or unequivocally waived by a tribe itself, that is, a waiver of tribal sovereign immunity is an exclusive legislative prerogative that can only be effected by a legislative act.

(N.J. Super. Court Law Div. 1999) (emphasis added) (forum selection clause in contract not waiver of immunity).

Any person transacting business with an Indian tribe (or for that matter with any government) who conducts a modicum of due diligence knows that tribes are immune from suit and that obtaining an explicit waiver of that immunity consistent with the tribal constitution is a prudent business practice. As a New Jersey appellate court recently remarked: "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions."[29] This was certainly true in 1993 when the AIA Agreement was signed.

Although tribal sovereign immunity from suit is often considered to be only 60 years old because the doctrine was first announced by this court in *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), the doctrine is actually older than the United States[30] and has been

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[29] *Danka*, at 841. Others have made this common sense observation. "Parties that are aware of the risks either demand an unequivocal waiver or they adjust contract terms to cover the substantial risk of a subsequent immunity defense." Julie A. Clement, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes should be "Foreign" Under the Foreign Sovereign Immunities Act*, 14 T.M. Cooley L. Rev. 653, 654 (1997). Those dealing with the Potawatomi often negotiate lock box arrangements, asset pledges, trust accounts, or waivers effected by tribal resolution. *See, e.g.*, C.P.N. Business Comm. Res. 01-58 (Dec. 8, 2000). Consistent with Sup. Ct. Rule 24, ¶ 1(f), the text of this resolution is set out in an appendix to this brief.

[30] *See, e.g., Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (noting that "tribal sovereignty * * * substantially predates our Constitution").

consistently recognized by the other two branches of the federal government.[31] The British Government, the Government of the Articles of Confederation, and the United States until 1871[32] dealt with Indian tribes through treaties, *i.e.*, as one sovereign would deal with another sovereign. Immunity from suit is an inherent attribute of sovereignty.[33]. Absent suit immunity, sovereignty would pass to the judiciary. State judges, not elected tribal officials, would become the supreme governors of the tribe. The effect of finding a waiver here would be to open the door to State regulation of Indian commerce in contravention of the Constitution. This is why seven states[34] have supported C&L in this case. States understandably do not like having sovereigns within their borders even though most, like Oklahoma,[35] specifically agreed upon entering the Union to respect the federally-protected

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[31] The judiciary also recognized tribal sovereignty long before *United States Fidelity & Guar. See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832).

[32] 25 U.S.C. § 71.

[33] "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without* its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." THE FEDERALIST No. 81,511 (A. Hamilton) (Belknap Press ed. 1961) (italics in original).

[34] Texas, Alabama, Arkansas, Kansas, Mississippi, Nebraska, and South Dakota have filed an amicus curiae brief in support of C&L. Hereafter these states will be referred to as "State Amici."

[35] *See* Organic Act, 34 Stat. 267, § 1 (June 16, 1906); OKLA. CONST., art. 1, § 3.

rights of Indian tribes.[36] States have consistently sought to end all tribal rights and have been the instigators of most of the federal abrogations of Indian treaties. The effect of removing tribal suit immunity would be to transfer sovereignty from tribes and tribal leaders to state judges, that is, to terminate tribal self-governance. This is a result dramatically at odds with recent Congressional enactments[37] and Presidential proclamations.[38]

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[36] *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977) ("There is little doubt that the claims to sovereign immunity have been allowed in the courts in order to protect the limited and irreplaceable resources of the Indian tribes from large judgments.").

[37] For example, the Potawatomi are organized as a self-governing tribe under federal law, the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 196. Federal laws are replete with implicit and explicit recognition of tribal sovereignty. For example:

> Congress finds that – (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes * * * [.]

Tribal Self-Governance Amendments of 2000, 106 Pub. L. No. 260, § 1, 114 Stat. 711 (Aug. 18, 2000); *see also* 25 U.S.C. § 2701. "(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; * * * ." *Id.* § 2703, ¶ (5)(B).

[38] Executive proclamations recognizing Indian sovereignty are bi-partisan from Lyndon Johnson through Ronald Reagan to Bill Clinton. The most recent is Executive Order 13175 of November 6, 2000, republished in 65 Federal Register 67249.

I. The AIA Agreement arbitration paragraph is not an unequivocal waiver of tribal sovereign immunity from suit.

> It is settled that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

Tribal suit immunity was raised by the Potawatomi in a motion to dismiss. Thus, C&L had the burden of proving the tribe waived immunity,[39] *i.e.*, to prove: (1) that

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"Our Nation, under the law of the United States, in accordance with treaties, Statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. * * * The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Executive Order § 2, ¶¶ (b) and (c).

[39] "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations, he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry

the tribe acted, and (2) that the tribe's action clearly and unequivocally waived immunity from suit and immunity of its assets from attachment. C&L's sole and only evidence of such a waiver is a form contract containing a paragraph (10.8) that authorized arbitration. This form contract was not tailored in any way for Indian tribes or, for that matter, for any government and was signed by three men, only one of whom was identified by the tribal office he then held. The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

The cases cited by C&L holding that an agreement to arbitrate is also a unequivocal waiver of tribal sovereign immunity when one of the parties to the agreement is a tribe are factually distinguishable,[40] based on equity considerations,[41] are overreaches by state

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throughout the litigation the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

[40] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). This is the first reported case cited by C&L supporting a claim that agreeing to arbitration is a waiver of suit immunity. It has been wrongly relied upon by subsequent courts. *See* discussion at pp. 36-37, *infra*. The waiver of suit immunity in *Oregon* arose not because the tribe agreed to arbitration in a contract, but because the tribe intervened in the suit.

[41] *Rosebud Sioux Tribe v. Val-U Co.*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 516 U.S. 819 (1995); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996).

courts,[42] or proceed from a misunderstanding of the purpose of an arbitration clause. An arbitration clause is what it is: a clause submitting contractual disputes to arbitration. Consistent with extant federal law, it cannot, as C&L and the State Amici argue, become a super clause that serves multiple functions when, *and only when,* one party to an agreement is an Indian tribe.

A. An arbitration clause is what it purports to be.

The purpose of an arbitration clause is to effect a waiver, but not a waiver of sovereign immunity. By agreeing to arbitration, the parties are mutually waiving whatever rights they had to a trial of disputes arising under the contract. Nevertheless, under C&L's theory of the case, a paragraph in the AIA Agreement – a single subparagraph of an Article captioned "Administration of The Contract" – unequivocally waives: (1) the requirement that a tribe acts only as authorized by its constitution, (2) tribal sovereign immunity from suit, (3) all immunity of assets held in the tribe's name even those held in trust, (4) the federal statutory requirement that a contract with an Indian tribe relative to its lands be endorsed by the Secretary of the Interior, *and* (5) the right to a trial of the disputed facts. This is a load that, as the Oklahoma Court of Appeals found, clause 10.8 of the AIA Agreement simply cannot rationally and equitably bear.

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[42] *Native Village of Eyak v. GC Contractors,* 658 P.2d 756 (Alaska 1983); *Hydaburg Coop. Assn. v. Hydaburg Fisheries,* 826 P.2d 751 (Alaska 1992); *Val/Del, Inc. v. Superior Court,* 703 P.2d 502 (Ariz.App. 1985), *cert. denied,* 474 U.S. 920 (1985).

The "magic" words in the paragraph that effects all these waivers are identified as "in any court having jurisdiction thereof." Pet. Br. 16. However, this phrase does not answer but begs the question of what court has jurisdiction. Absent an unequivocal waiver of immunity, Oklahoma courts do not have jurisdiction over an Indian tribe. Every contract is presumably enforceable "in any court having jurisdiction." All an arbitration clause does is make explicit what is implicit, that is, a party may enforce an arbitration award in the same manner as the party may have enforced the contract "in any court having jurisdiction." The magic words are not an explicit waiver of suit immunity and clearly not a grant of jurisdiction to any particular court.

B. The Potawatomi Business Committee never waived immunity.

Even if this phrase has the magic properties claimed, where is the evidence that the tribe has authorized the AIA Agreement and thus effected an unequivocal waiver of suit immunity? The only evidence of record is that three men (*see* note 5, *supra*) signed the AIA Agreement. As with federal, state and local governments,[43]

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[43] Though local governments are not sovereigns on a par with Tribes, they would enjoy a broader suit immunity under C&L's theory of the case than Indian tribes. "Municipal corporations may also stipulate in contracts for arbitration of disputes arising thereunder. These powers, based on its capacity to contract and the right to prosecute and defend suits, **may be exercised only by the corporate legislative body**, which has implied power thus to bind the corporation, or by its

corporations, and fictional entities,[44] tribes act only in the manner authorized by the documents creating them.

> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

United States v. United States Fidelity & Guaranty Co., 309 U.S. at 513. "We are of the opinion, however, that without legislative action the doctrine of immunity should prevail." *Id.* at 515. *See, e.g., Hydrothermal Energy Corporation v. Fort Bidwell Indian Community Council*, 170 Cal. App. 3d 489 (1985) (reversing a lower court order confirming an arbitration award entered on a contract executed by tribal chairman):

> Thus, [the chairman] could not waive the tribe's immunity, unless the Tribe had expressly delegated that duty to her. Nothing in the Tribe's constitution and bylaws gave her such authority. That document states: "It shall be the duty of the chairman of the community council to preside at all meetings of the council and to carry out all order [*sic*] of the council. The chairman of

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agent under expressly delegated authority." 5 AM. JUR. 2d *Arbitration and Award* § 68 (1962) (footnotes omitted) (emphasis added).

[44] "Under the [State] statutes [authorizing arbitration], the court is usually considered to have jurisdiction to enforce the arbitration agreement in all cases except those in which it has no jurisdiction over the parties or over the subject matter of the litigation." *Id.* § 74 (1962) (footnote omitted).

> the council shall also preside at the general community meetings. The chairman shall also be the chief executive officer of the community." Those words do not indicate that the Tribe authorized the chairman to waive its immunity. We therefore find that Ms. Lame Bull's signature did not bind the Tribe to accept jurisdiction before the arbitrator. The arbitrator's decision that the American Arbitration Association had jurisdiction was based on an erroneous finding of waiver by execution of the contract.

Id. at 497 (footnotes omitted).[45]

> Because preserving tribal resources and tribal autonomy are matters of vital importance, the United States Supreme Court has repeatedly stated that a waiver of tribal sovereign immunity " ' "cannot be implied but must be unequivocally expressed" ' " (*id.*, quoting *United States v King*, 395 US 1, 4). Importantly, **to be valid, waivers of tribal sovereign immunity "must be traceable to an official government action (statute, ordinance, resolution)** that expressly and unequivocally waives immunity or empowers particular officers to waive immunity" * * * .

Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc., 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993 (1995) ("sue and be sued" clause not waiver of immunity) (footnote omitted, emphasis added).

The Potawatomi created a government pursuant to federal law by adopting a constitution at a federally-

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[45] The constitutional language construed by the California court is similar to that contained in the Potawatomi Constitution.

monitored and approved constitutional election. Under that Constitution, the Business Committee, not three tribal officers, is authorized to transact business for the tribe (*C.P.N.* CONST. art. VII, § 2) and the Business Committee only acts by adopting resolutions for temporary matters such as this AIA Agreement. *Id.* at art. XVIII, § 2. C&L never offered any evidence (and there is none) that the Business Committee approved the AIA Agreement, adopted a resolution relating to the AIA Agreement, or otherwise lawfully acted to waive immunity. Because the Potawatomi have never waived immunity by a legislative act, no waiver of suit immunity could be found consistent with this Court's jurisprudence.

C. Finding a waiver here would be contrary to the general law on sovereigns.

Although State sovereign immunity must be read in context with the Eleventh Amendment, this Court's discussions of State sovereign immunity are instructive.

> While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark v. Barnard*, 108 U.S. 436, 447-448, 27 L. Ed. 780, 2 S. Ct. 878 (1883). This case turns on whether either of these two circumstances is present.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669-670 (1999). These are the same tenets this Court applies in evaluating purported waivers of immunity by Indian tribes or by the United States. *See, e.g., Kiowa Tribe*, 523 U.S. at 760. ("Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case"); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 443-44 (1834). "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

The consistent rule that emerges from this Court's sovereign immunity jurisprudence is that a waiver can be effected only by a legislative body. The sovereign, acting through its legislative arm, controls immunity. Waiver of sovereign immunity is a legislative act, not a matter of contract. "The doctrine of governmental immunity has long been the law of this state. If the present policy is to be changed it should be done by the legislature, as representatives of the people, and not by this court." *Spaulding v. Department of Transportation*, 618 P. 2d 397, 398 (Okla. 1980) (quoting *Henry v. Oklahoma Turnpike Auth.*, 478 P. 2d 898, 903 (Okla. 1970). This fact is certainly borne out by the State Amici whose legislatures zealously guard their sovereignty.

Nebraska has enacted the "State Miscellaneous Claims Act," that establishes a state claims board "to receive and investigate miscellaneous claims against the state." Neb. Rev. Stat. § 81-8,295, *et seq.*; *id.* § 81-8,296. Nevertheless, "[n]othing [in the Act] shall be construed to be a waiver of the sovereign immunity of the state

beyond what is otherwise provided by law." *Id.* § 81-8,297. The Act does not waive suit immunity. Nebraska has also enacted the "State Contract Claims Act," whose procedures are a mandatory predicate for a claimant to "initiate an action in the district court of Lancaster County." *Id.* § 81-8,302, *et seq.*; *id.* § 87-8,305, ¶ (3). Nebraska successfully asserted sovereign immunity when a tribe sued to require negotiation of a gaming compact even though Nebraska enacted a statute specifically authorizing the negotiation.

> "While it is true that a state may waive Eleventh Amendment immunity through its conduct, a state official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes or decisions." *Santee Sioux Tribe of Nebraska*, 121 F.3d at 431 (citations omitted). Certainly the principles governing the extent to which a sovereign may consent to suit also should be applicable to this tribe. By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, Danka Business Systems and Danka Funding failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

Danka, 747 A.2d at 842.

Alabama has firmly embraced suit immunity in its Constitution and its courts have reinforced the principle "That the State of Alabama shall never be made a defendant in any court of law or equity." ALA. CONST. art. I, § 14. The wall of "governmental immunity" is almost invincible, made so by the people through their Constitution as interpreted by the Supreme Court of Alabama.

Hutchinson v. Board of Trustees of Univ. of Ala., 256 So.2d 281, 284 (Ala. 1971). This section not only forbids a suit against the state, but against its officers and agents in their official capacity, when a result favorable to the plaintiff or complaint would directly affect a contract or property right of the state. *Druid City Hosp. Bd. v. Epperson*, 378 So.2d 696, 697-698 (Ala. 1979). The Alabama Legislature may not consent to a suit against the state prohibited by this section. *Armory Comm'n v. Staudt*, 388 So.2d 991, 992 (Ala. 1980). Where a contractor was seeking monetary damages for breach of contract against a state university, appellate court held that this section prohibits a court from exercising jurisdiction over such suit. *Sparks Constr. v. State Bldg. Comm'n*, 664 So.2d 905, 907 (Ala. Civ. App. 1994).

The Arkansas Constitution explicitly provides that "The State of Arkansas shall never be made defendant in any of her courts." ARK. CONST. art. V, § 20. Arkansas has established a State Claims Commission, but even when the state submits to jurisdiction,[46] it shall pay only "actual, but not punitive, damages adjudged by a state or federal court."[47]

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[46] Arkansas is not, however, prohibited from waiving its sovereign immunity or voluntarily entering its appearance in litigation. *Arkansas Game & Fish Comm'n v. Lindsey*, 771 S.W.2d 769, 770 (Ark. 1989). Presumably Arkansas courts would not accept a purported waiver in a contract absent legislative action.

[47] ARK. CODE ANN., § 21-9-203, ¶ (a). *See also*, ARK. CODE ANN. § 21-9-301, ["[C]ounties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be

South Dakota's Constitution provides that: "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. CONST., art. III, § 27. The South Dakota Legislature has given that consent but only to the extent of liability insurance purchased. S.D. Codified Laws § 21-32A-1, -2, -3.

Mississippi, Texas and Kansas have also legislatively established the procedures that individuals must follow to assert claims against the state and have set limitations on what kinds of claims may be asserted and the maximum liability that may be awarded. *See* Miss. Code Ann. § 11-46-3 ("The Legislature * * * does hereby declare, provide, enact and reenact that the 'state' and its political subdivisions * * * are not now, have never been and shall not be liable and are, always have been and shall continue to be immune from suit at law * * * ."). TEX. CIV. PR. & REM. CODE ANN. § 101.001, *et seq. See also, Seamans v. Harris County Hosp. Dist.*, 934 S.W.2d 393, 395 (Tex. App. 1996) (tort claims act did not abolish sovereign immunity but merely waived it in certain circumstances); Kan. Stat. Ann. § 75-6101, *et seq., Barger v. Kansas*, 620 F.Supp. 1432, 1438 (D. Kan. 1985) (enactment does not equal evidence that Kansas waived immunity from suit under the Eleventh Amendment).

As the constitutions, statutes and case law of the State Amici demonstrate, State sovereigns through their constitutional and legislative enactments tightly control

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immune from liability and from suit for damages except to the extent that they may be covered by liability insurance."]

any waivers of suit immunity. The same is true of the Potawatomi. *See* C.P.N. note 29, *supra*. Those who specifically negotiate with the tribe for a waiver of immunity *never* obtain more than a limited waiver. Here C&L is asking this Court to find that an unlimited waiver of sovereign immunity to suit and total asset immunity can be inferred from a form arbitration paragraph. This boundless waiver of suit immunity is much greater than any waiver that could reasonably have been obtained from the Potawatomi or the legislative body of any sovereign.

The State Amici argue that affirming the opinion below would result in "a paternalistic brand of immunity that must be protected against a tribe's own efforts to waive it." State Amici Br. at 1-2. This assertion has no merit. The Potawatomi have made no effort to waive their immunity. "Paternalism" has nothing to do with the suit immunity that is an attribute of sovereignty. Affirming the decision of the Oklahoma Court of Appeals would be entirely consistent with sovereign suit immunity jurisprudence including that involving states. What C&L is asking for is a complete reversal of this court's jurisprudence from recognizing tribal suit immunity as an inherent attribute of a government to paternalistically protecting corporations (who can afford to litigate a $25,000 contract case for seven years, but neglect to negotiate an immunity waiver) from Indian tribes.

> We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S. at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the

sovereignty." *Beers v. Arkansas*, 61 U.S. 527, 20 HOW 527, 529, 15 L. Ed. 991 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284, 50 L. Ed. 477, 26 S. Ct. 252 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 88 L. Ed. 1121, 64 S. Ct. 873 (1944). *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (State's consent to suit must be "unequivocally expressed"). **Thus, a State does not consent to suit** in federal court merely by consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-445, 44 L. Ed. 1140, 20 S. Ct. 919 (1900). Nor does it consent to suit in federal court **merely by stating its intention to "sue and be sued,"** *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-150, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981) (per curiam), **or even by authorizing suits against it " 'in any court of competent jurisdiction,' "** *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579, 90 L. Ed. 862, 66 S. Ct. 745 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers v. Arkansas*, supra. There is no suggestion here that respondent Florida Prepaid expressly consented to

> being sued in federal court. Nor is this a case in which the State has affirmatively invoked our jurisdiction.

Florida Prepaid at 675-676 (emphasis added).

> [This Court has] observed (in dictum) that there is "no place" for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (internal quotation marks omitted).

Id. at 678.

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393, 81 L. Ed. 1177, 57 S. Ct. 809 (1937). *See also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307, 81 L. Ed. 1093, 57 S. Ct. 724 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern*, 322 U.S. at 51; *Pennhurst*, 465 U.S. at 98. And **in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are not implied.** *See,*

> *e.g., United States v. King*, 395 U.S. 1, 4, 23 L. Ed. 2d 52, 89 S. Ct. 1501 (1969) (describing the "settled proposition" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

Id. at 681 (emphasis added).

This Court rejected the argument asserted in *Florida Prepaid* that the state had "constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational investment vehicle in interstate commerce after being put on notice by the clear language of the TRCA that it would be subject to Lanham Act liability for doing so." *Id.* at 680.

> But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an "altogether voluntary" decision to waive its immunity. *Beers*, 20 HOW at 529.

Id. at 680-681.

D. Some Circuit and State courts have not properly applied this Court's sovereign immunity jurisprudence.

C&L cites *Rosebud Sioux Tribe v. Val-U Construction* where the Eighth Circuit found that an arbitration clause waived immunity. Pet. Br. at 22-23. The Eighth Circuit's decision in *Val-U Construction* is proof of the adage that "bad facts make bad law." Unlike C&L, Val-U Construction had performed a substantial amount of work for the defendant tribe when the tribe terminated the contract.[48] The Eighth Circuit inappropriately distinguished the *Val-U Construction* decision from its earlier decision in *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*,[49] by stating that the contract in *Val-U Construction*

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[48] The decision in *Val-U Construction* is inconsistent with law from the Tenth Circuit and other federal courts. *See, e.g., Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) (tribal defendants did not expressly waive sovereign immunity of tribal authorities by agreeing to attorney fee clause in construction contract, consenting to partial summary judgment with respect to certain disputed sums owed under the contract, or including "sue and be sued" clause in tribal corporate charter). Where waivers have been found, the waivers have been explicit. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (tribal council passed formal resolution, approved by the Secretary of the Interior, expressly waiving sovereign immunity) and *A. K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (tribal bingo agreement expressly "waives sovereign immunity" for actions brought to enforce or interpret contract).

[49] 780 F.2d 1374, 1381 (8th Cir. 1985) (promissory note reserving "rights and remedies provided by law" in favor of lender, providing for attorney fees in the event of a collection

designated an arbitral forum to settle all disputes. *Val-U Construction,* 146 F.3d at 577.

The second case cited by C&L is *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association,* 86 F.3d 656 (7th Cir. 1996). Pet. Br. at 23-27. In *Sokaogon,* the non-tribal party was seeking to recover for services rendered to the tribe. The Seventh Circuit found an effective waiver of sovereign immunity in an arbitration clause similar to the one at issue herein probably because of equity considerations.

> Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and **this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit,** especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions.

Sokaogon, 86 F.3d at 659-660 (emphasis added). The Seventh Circuit's "doubt" about the explicitness required to find a waiver of suit immunity was subsequently put to rest by the decision in *Kiowa Tribe v. Manufacturing*

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action, and containing a conflict of laws provision did not constitute express waiver of promisee tribe's sovereign immunity).

Technologies, Inc., supra, which vacated a decision by the Oklahoma Supreme Court[50] based on similar reasoning.

C&L principally relies on state cases[51] that misconstrued a Ninth Circuit decision to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision (*see* note 40, *supra*) held that an Indian tribe waives suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution." *Sycuan Band of Mission Indians,* 884 F.2d at 419. The Ninth Circuit later recognized that state courts (Alaska and Arizona, *see* note 42, *supra*) had misconstrued its pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereignty," the Ninth Circuit refused "to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration

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[50] *Aircraft Equip. Co. v. Kiowa Tribe,* 1997 OK 59, 939 P.2d 1143, 1147 (rejecting the argument "that Oklahoma's judicial power can only be extended over her Indian tribes upon express tribal or congressional consent"); vacated and remanded *sub nom Kiowa Tribe v. Aircraft Equip. Co.,* 524 U.S. 901 (1998).

[51] *See* note 42, *supra.*

clause." *Id.* at 420. The Ninth Circuit specifically noted that a formal resolution expressly waving sovereign immunity was the type of waiver favored by the Supreme Court, citing *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130, * * * (1982). *See Sycuan Band of Mission Indians*, 884 F.2d at 419.

Nothing remotely similar to the situations resolved in these state and circuit decisions occurred here. The Potawatomi have consistently and un-mistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They never received any goods or services from C&L. They have never intervened in any litigation. In any event, these state cases cannot overrule United States Supreme Court decisions holding that it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. The Potawatomi do not seek special treatment for Indian tribes, but do ask the Court to continue to apply consistent standards for the waiver of immunity by a sovereign even if that sovereign happens to be an Indian tribe.

II. The AIA Agreement is null and void on its face under federal law.

The AIA Agreement is void on its face under federal law. This fundamental flaw in C&L's claim was never addressed by the Oklahoma courts though they were consistently advised of the issue. *See* notes 16, 20, and 23, *supra*. When the AIA Agreement was executed, 25 U.S.C.

§ 81 (hereafter, "Section 81")[52] made any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The AIA Agreement was to construct a roof on a building located on land owned by the Potawatomi. C&L performed no construction nor provided any services to the Potawatomi. However, had the contract been performed, C&L's services would clearly have been "relative to" Indian lands.

In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914), this Court held that a contract with an Indian tribe not endorsed with the approval of the Secretary of the Interior was null and void. Neither the arbitrator nor the Oklahoma courts attempted to justify or explain their enforcement of the C&L agreement despite the lack of Secretarial endorsement. However, C&L has argued that Secretarial approval was not necessary because the land where the contract would have been

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[52] In *Kiowa Tribe*, this Court noted that "Congress has taken the lead in drawing bounds of tribal immunity * * * [and] is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, at 759. In response to or consistent with this language, Congress amended Section 81. Mar. 14, 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46; *see* Senate Rep. 106-150 (Sept. 8, 1999). As now amended, Secretarial approval is only required for an agreement with an Indian tribe that "encumbers Indian lands for a period of seven or more years." Contracts requiring Secretarial approval must contain remedies in case of breach, a reference to tribal law on suit immunity, or an express, limited waiver of suit immunity. 25 U.S.C. § 81 (2000).

performed is not *trust* land,[53] but merely *restricted* Indian land. This distinction is not valid.

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus the statute uses the term "their [the Indians] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-Intercourse Act, 25 U.S.C. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonso v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Narragansett Indian Tribe v. RIBO, Inc., 686 F.Supp. 48, 51 (D.R.I. 1988).

A contract null and void on its face cannot be evidence sufficient to show that a tribe has waived sovereign immunity. Although Section 81 was never discussed by the court below, Congress' enactment of that statute and

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[53] Resp. Br. in Opp. to Cert. Pet. 18. Case No. 96-1721.

subsequent amendments thereto evidence clear legislative approval of this Court's requirement that waivers of tribal sovereign immunity be "unequivocally" expressed.

III. Insofar as Relevant, Analogies to Foreign Sovereign Immunities Would Reject an Implied Waiver Here.

Sensing that its assertions may be unavailing if tested against the standard of tribal immunity law, C&L has suggested that the appropriate analogy for this Court's consideration is that of foreign sovereign immunities. Pet. Br. 25-26. The threshold problem with this argument is that the Foreign Sovereign Immunities Act (FSIA) "is inapplicable to federally recognized Indian tribes." *Pezold v. Cherokee Nation Industries, Inc.*, No. 94,054, slip op. at 6 (OK Civ. App. Sept. 1, 2000), *reh'g den.* (Sept. 29, 2000) *pet. for cert. filed* (Oct. 20, 2000). Although a federal statute of general applicability usually applies to Indian Tribes,[54] the FSIA is a statute of specific applicability to "foreign states." 28 U.S.C. §§ 1602, 1330. Indian tribes are clearly legally distinct from "foreign states" under the fundamental law of this country. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (noting that the United States

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[54] *Federal Power Com. v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). Exceptions to this general rule include where (1) "the law touches the exclusive rights of self governance in purely intramural matters"; (2) "application of the law to the tribe would abrogate rights guaranteed by Indian treaties"; of (3) "there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians or their reservations * * * ." *Donavan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115-16 (9th Cir. 1989).

Constitution views Indian Tribes "as entirely distinct"). The Constitution specifically recognizes this distinction: "Congress shall have the Power to * * * to regulate commerce with foreign Nations, and among the several States and with the Indian tribes; * * * ." U.S. CONST., art. I, § 8, cl. 3.

Another problem with this attempted analogy is that it does not support C&L's claim. The law of foreign sovereign immunities has been unequivocal in its skepticism of implied waivers through arbitration agreements, and, moreover, has required a searching review of a purported sovereign agent's authority to waive.

A. FSIA case law should not be applied by analogy to Indian tribes.

In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, this Court found Congress' role in delimiting foreign sovereign immunities as "instructive" as to problems of tribal immunity. 523 U.S. at 759. But this is not the same as saying that the precise modalities of tribal immunity are to be determined by analogy from foreign sovereign immunities. And when the Court in *Idaho v. Coeur d'Alene Tribe of Idaho* indicated that "Indian tribes * * * should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity," 521 U.S. 261, 268 (1997), it was simply to indicate that plaintiff tribes are no different from private suitors in bringing unconsensual suits against States, and not to doctrinally connect tribal and foreign sovereign immunities. Nevertheless, some courts have purported to rigorously apply, by analogy, foreign sovereign immunities to Indian

tribes. *See Hydaburg Coop. Assn. v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992). This effort has been so observed in the academic literature. *See also* John W. Borchert, *Tribal Immunity through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification*, 13 EMORY INT'L L. REV. 247 (1999); Clement, note 29, *supra*.

On the other hand, courts have appeared quite comfortable in asserting that Indian tribes are entitled to the dignity and privileges appertaining to sovereigns, among which is sovereign immunity from unconsented suits in its own tribunals and those of coordinate jurisdictions. The analogy to foreign sovereign immunity has been useful, as this Court intimated in *Kiowa Tribe*, 523 U.S. at 751, in locating the source of this doctrine in federal law and acknowledging that it is subject to the plenary power of Congress under the Indian and Foreign Commerce Clauses. U.S. CONST., Art. I, § 8, cl. 3. C&L's suggestion (Pet. Br. 19, n.2) that Indian tribes should be placed in some rigid hierarchy and categorically held to have immunities inferior to those enjoyed by States of the Union and foreign sovereigns has no Constitutional support and is without merit.

B. The FSIA analogy is no help to C&L in any event.

To the extent that the federal law of foreign sovereign immunities is relevant to the precise question raised here, it actually supports the Potawatomi position: the AIA Agreement was not an effective waiver of the Tribe's immunity. Although C&L's reliance on the *Restatement (Third) of Foreign Relations Law* might be appropriate

under different facts, the critical source for determining the content of federal law on that subject is the 1976 FSIA, 28 U.S.C. §§ 1601-11, and cases construing its provisions. The Act provides an exception for the presumptive immunity of foreign sovereigns where "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), and where an action is brought to confirm an award made pursuant to an agreement to arbitrate. *See id.* § 1605(a)(6).

Nevertheless, this Court has held that arbitral agreements that might notionally constitute implied waivers of immunity must be narrowly construed. In *Argentine Republic v. Amerada Hess Shipping Corp.*, this Court observed, "Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." 488 U.S. 428, 442-43 (1989). Other courts have emphatically held that implied waivers should be construed narrowly and that the crucial feature of such a waiver – in order to be effective – is that the foreign sovereign's words or conduct evince a willingness to be sued in a particular forum. *See Creighton Ltd. v. Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999); *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999); *Hilao v. Estate of Marcos*, 94 F.3d 539, 546-48 (9th Cir. 1996); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). Even more specifically, courts have found that a general agreement to arbitrate, without a particular expression of willingness to have enforcement or confirmation proceedings in

a particular jurisdiction, does not constitute a waiver of sovereign immunity for suits brought in that jurisdiction. *See Seetransport-Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993); *Creighton Ltd. v. Qatar*, 181 F.3d at 122; *see also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) ("[M]ost courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States").

Extending the analogy of these authorities to this case, it is manifest that the arbitration clause in the AIA Agreement, could not constitute a valid waiver of the Tribe's immunity. No situs is established for the arbitration in Oklahoma, nor, indeed, in any State. There is thus no *lex loci arbitrii* to constitute an implied invitation to litigate contract disputes in a State court. C&L places substantial reliance on the language that "judgment may be entered upon it [the arbitral award] in accordance with applicable law in any court having jurisdiction thereof [and] * * * enforceable under applicable law in any court having jurisdiction thereof." Pet. App. 46. But as the foreign sovereign immunity cases make clear, unless the applicable law is that of the ostensible forum and is specifically selected in the contract, this cannot operate as an effective waiver of sovereign immunity. *See Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1102 n. 13 (D.C. Cir. 1982); *Creighton Ltd. v. Qatar*, 181 F.3d at 122-23. Needless to say, the AIA Agreement did not designate Oklahoma law as the law of the contract. Under foreign sovereign immunity principles, the

arbitration clause in the AIA Agreement was not an effective waiver of the Tribe's immunity to suit in Oklahoma courts.

C. The absence of governmental action is still fatal.

Even if the AIA Agreement is construed as an effective waiver, that still leaves the question of its validity insofar as the signatories acting for the Tribe did not have authority to waive the Tribe's immunity. (Such authority was Constitutionally vested in the Tribe's Business Committee, the authority of which C&L should be charged with notice.) Moreover, under the AIA Agreement itself, Pet. App. 49, the required formal "notice to proceed" was never issued by the project architect. Cert. Pet. 7. While the question of authority to waive has been considered above, it is worth reiterating here that under foreign sovereign immunity principles the law to be applied to such a question is that of the foreign sovereign, as understood consistent with the FSIA. *See First Nat'l City Bank v. Banco Para el Commercio*, 462 U.S. 611, 621-22 (1983); *Aquamar S.A. v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1293-94 (11th Cir. 1999); *Jota v. Texaco, Inc.*, 157 F.3d 153, 162-63 (2d Cir. 1998).

The laws of some foreign States forbid waivers of immunity by individual officials acting alone or as with the Potawatomi do not authorize officials to waive. These restrictions have been respected by U.S. courts applying foreign sovereign immunities. As a matter of agency law, this would be a question of actual authority under the law of the sovereign.

To complete the analogy, the law of the "foreign" sovereign (the Potawatomi) controls the question of whether the three tribal officials had the authority to waive the tribe's sovereign immunity. The answer is that they did not. Under the Potawatomi Constitution, the business Committee has the power to act for the tribe by adopting resolutions or ordinances. Section 6 of the Potawatomi Code of Civil Procedure provides that "Nothing contained in this Act shall be construed to be a waiver of the sovereign immunity of the Tribe, its officers, employees, agents, or political subdivisions or to be a consent to any suit **beyond the limits now or hereafter specifically stated by Tribal law.**" (emphasis added) Thus, under Potawatomi law, absent adoption of an ordinance or resolution by the Potawatomi Business Committee waiving sovereign immunity, the tribe cannot be sued. As confirmed by the Potawatomi Supreme Court, nothing in the constitutional or statutory law of the Potawatomi authorizes suit immunity to be waived by tribal officials or by contract.

> The Citizen Band Potawatomi Indian Tribe of Oklahoma, like each Indian tribe, is exempt from suit without Congressional authorization. This is the doctrine of sovereign immunity. The Tribe has not expressly waived its sovereign immunity, and Tribes are immune not only from direct legal action against them without consent, but also they are immune from indirect attempts to sue them by naming their officers as defendants.

Sulcer v. Barrett, 17 Ind. Law Rptr. 6139, 1990 WL 655878 (Cit. B. Potawatomi), 2 Okla. Trib. 76, 81 (Cit. B. Potawatomi 1990); *see also Sulcer v. Davis*, 986 F.2d 1429

(10th Cir. 1993) [slip op. reprinted at 1993 U.S. App. LEXIS 3457], *cert. denied*, 510 U.S. 870 (1993).

Thus, if the Court looks to the law of foreign sovereigns as urged by C&L and the State Amici, the Court should find that C&L failed to meet its burden under a motion to dismiss because it failed to produce evidence that suit immunity was waived as required under Potawatomi law, *i.e.*, that the Potawatomi Business Committee waived the tribe's immunity as claimed.

CONCLUSION

The Opinion of the Oklahoma Court of Civil Appeals should be affirmed.

Respectfully submitted,

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CITIZEN POTAWATOMI NATION

RESOLUTION # 9-58

A RESOLUTION APPROVING A LOAN AGREEMENT AND ATTACHED EXHIBITS ON BEHALF OF THE CITIZEN POTAWATOMI NATION, AUTHORIZING THE CHAIRMAN AND VICE-CHAIRMAN TO SIGN SAID AGREEMENT AND ATTACHED EXHIBITS, AND GRANTING A LIMITED WAIVER OF SOVEREIGN IMMUNITY

WHEREAS, the Citizen Potawatomi Nation is a federally recognized tribe of American Indians with constitutional authority under the Thomas-Rogers Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967); and

WHEREAS, the Citizen Potawatomi Nation, the largest of the Potawatomi Indian Tribes, has, through a continuation of Potawatomi history and organized self government since time immemorial, sovereign powers inherent in tribal tradition and recognized by treaties with the United States and in the United States Constitution; and

WHEREAS, the Citizen Potawatomi Nation Constitution and By-Laws provide that the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Potawatomi Nation in all matters on which the Tribe is empowered to act now or in the future; and

WHEREAS, the Citizen Potawatomi Nation is constructing Firelake Discount Foods and wishes to obtain long-term permanent financing; and

WHEREAS, the Citizen Potawatomi Nation Business Committee has directed Chairman John A. Barrett, Jr. and Vice-Chairman Linda Capps to negotiate documents necessary to obtain financing to construct and equip Firelake Discount Foods; and

WHEREAS, First Capital Group, Inc., has agreed to loan $5,050,000 to the Citizen Potawatomi Nation to finance said construction;

NOW THEREFORE, BE IT RESOLVED that the Business Committee of the Citizen Potawatomi Nation hereby approves the attached Loan Agreement and the exhibits attached thereto; authorizes Chairman John A. Barrett, Jr. and Vice-Chairman Linda Capps to sign said

CITIZEN POTAWATOMI NATION

agreement and exhibits on behalf of the tribe; and waives, limits and modifies the sovereign immunity of the Citizen Potawatomi Nation from suit solely to the extent necessary and as hereinafter limited to permit First Capital Group, Inc., to obtain a judgment in the jurisdictions as set forth in Section 7 of the Loan Agreement for obligations imposed by said Loan Agreement and attached exhibits when they are signed as herein authorized and to collect such judgments. The Business Committee also hereby waives asset immunity as to the collateral identified in said Loan Agreement and exhibits as therein provided. If First Capital Group, Inc., obtains said judgment and any amount thereof remains owing after First Capital Group, Inc., has used commercially reasonable efforts to foreclose its lien on or security interest in said assets and apply the proceeds thereof to the loan and to pursue its remedies against any guarantors, then, in that event, the Business Committee also waives asset immunity as to other tribal assets that are not held in trust nor whose management and disposition is reserved to the Citizen Potawatomi Nation Indian Council by the Constitution. This limited waiver of sovereign immunity by the Citizen Potawatomi Nation may not be construed as authorizing any other suit or kind of action by First Capital Group, Inc., or anyone else against the Citizen Potawatomi Nation.

CERTIFICATION

We, the members of the Business Committee of the Citizen Potawatomi Nation do hereby certify that the above is a true and exact copy of Resolution POTT # 01-58 as approved on the 8th day of December, 2000, with 5 voting for, 0 opposed and 0 absent.

John A. Barrett, Jr., Chairman

Gene Bruno, Secretary-Treasurer

Resp. App. 2

(9)

FEB 20 2001

Supreme Court, U.S.
FILED
FEB 20 2001
CLERK

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Reply to Respondent's Statement of the Case.

Respondent commences its Statement of the Case with the comment that the contract between the parties "was never approved nor otherwise authorized by the Potawatomi Business Committee." (Resp.Br. 6). In fact, in its original Petition For Confirmation of Arbitration Award filed below, Petitioner, C&L Enterprises, Inc., ("C&L") specifically alleged that the contract with the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") "was executed, for [Potawatomi], by three officers of [Potawatomi] including [Potawatomi's] Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis," and one other then unidentified officer. C&L's Petition further alleged that "[s]aid officers had actual and/or apparent authority to bind [Potawatomi] upon said contract." (Pet.App. 28). Potawatomi did not deny these allegations of the original Petition.

Indeed, Potawatomi admits that the three individuals executing the contract on its behalf were the Chairman, the Secretary/Treasurer and a Councilman, all of whom were members of the Potawatomi Business Committee. Potawatomi admits that its Business Committee is "constitutionally authorized to 'enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation.' " (Resp.Br. 6, n.6). Any doubt about the ability of the Business Committee to waive sovereign immunity for Potawatomi is further put

to rest by the self serving yet revealing Resolution attached to Potawatomi's Brief. (Resp.App. 1).[1]

Therefore, Potawatomi's entire argument of lack of authority is reduced to its assertion that the Potawatomi Business Committee may only act by ordinances and resolutions and that the "record contains no tribal resolutions or other evidence that the Business Committee ever took any action on" the contract with C&L. Although the first element of this claim, that each and every business act conducted by the tribe requires a resolution or ordinance of the Business Committee, raises considerable suspicion, the second element of the assertion is remarkable in its obliqueness.

The Potawatomi do not say that there were no tribal ordinances or resolutions regarding the contract. Rather, they say the "record contains no tribal resolutions or other evidence" of such action. Below, the Potawatomi couched this argument by saying C&L did not "adequately allege" that the persons signing the contract for Potawatomi had actual authority to contract for

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[1] Interestingly, Potawatomi does not produce any resolution dealing with the construction at issue such as any resolution relating to C&L, relating to the contractor performing the construction after the breach with C&L, relating to the general construction of the bank building at issue, or relating to the authority of the Chairman or other members of the Business Committee to execute agreements regarding such construction. Rather, the "Resolution" produced by Potawatomi is dated December 8, 2000, after this Court's Order of October 30, 2000, granting the petition for a writ of certiorari herein. Obviously, the procedure followed and the form of the resolution was affected by the pendency of this action.

Potawatomi. Indeed, C&L would be most interested in the response of Potawatomi's counsel if, during the course of oral argument, the Court were to ask him the direct question: Did the Potawatomi Business Committee ever authorize execution of the C&L contract either by direct action or by granting such authority to the individuals who executed the contract on behalf of Potawatomi?[2]

Next, Potawatomi proceeds to attempt to raise a number of factual issues which are irrelevant to the pending appeal. The underlying issues of breach of the contract by Potawatomi and the damages sustained by C&L were resolved by arbitration and by Potawatomi's choice not to litigate such factual issues either in the arbitration proceedings or in the state court action to confirm the arbitration award. The fundamental unfairness of attempting to litigate such factual issues for the first time on appeal is enhanced by the fact that, given the nature of the arbitration proceedings and Potawatomi's choice not to appear and defend the state court action, C&L does not

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[2] Following Potawatomi's argument, a resolution of the Business Committee would have been required to enter into any contract, regardless of whether the contract included an arbitration agreement. However, Potawatomi has produced no resolution pertaining to any aspect of the construction of the bank building involved in the present action. It follows then that either the entire building was contracted for, built and paid for by Potawatomi without authority or the Potawatomi have purposefully withheld such resolutions from production here or in the proceedings below. Moreover, Potawatomi's argument of lack of authority is an alternative theory which was neither addressed nor decided by the courts below. As hereafter discussed, the issue should not be addressed in the first instance here.

have the benefit of having conducted discovery. Potawatomi now makes claims such as the purported reasons for changing the roof, the alleged cost of completion of the roof by the subsequent contractor, and the supposed lack of authorization by the Business Committee with no evidentiary basis in the record and with the comfort of knowing that C&L does not have the fruits of discovery with which to refute the claims.

Potawatomi decries the attorney fees awarded C&L by the lower court and, at page 14 of its Brief, refers to the present action as an "insignificant contract case." From the numerous relevant docket entries from the trial court and from the Supreme Court of the State of Oklahoma (which do not even include the three intervening actions attempted by Potawatomi in the U.S. District Court for the Western District of Oklahoma and Potawatomi's unsuccessful appeal of the same to the Tenth Circuit Court of Appeals) two things are evident. First, the Potawatomi's characterization of the attorney time expended by C&L's counsel as arising from a case with no contested hearings and a default judgment is, at best, misleading. Second, Potawatomi's actions demonstrate that it genuinely views this case as anything but insignificant.

II. This Court Should Decline to Consider in the First Instance Whether the Officers of the Potawatomi Business Committee Who Executed the Contract with C&L Had Actual or Apparent Authority to Execute the Contract.

Potawatomi alternatively argues that its Business Committee never authorized the contract containing the arbitration agreement.[3] Consistent with the analysis of the United States at pages 28 and 29 of its Brief as Amicus Curiae supporting the Respondent, this argument advanced by Potawatomi was not addressed by the Court of Civil Appeals of Oklahoma or the Oklahoma Supreme Court, is not within the scope of the question on which this Court granted certiorari and, therefore, should not be addressed in the first instance here. *See NCAA v. Smith*, 525 U.S. 459 (1999) (refusing to decide in the first instance issues not decided below); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (noting the Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below").

Here, the opinion of the Court of Civil Appeals of Oklahoma makes no mention whatsoever of the authority

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[3] Potawatomi minimizes execution of the contract at issue stating "[t]he only evidence of record is that three men signed the AIA Agreement." (Resp.Br. 22). As has been established, these "three men" were all members of the Potawatomi Business Committee and included the Chairman and the Secretary/Treasurer. Potawatomi's own constitution states that three members of the Business Committee would constitute a quorum at any meeting. *See* C.P.N. Const., art. XVII, § 1.

of the Business Committee or its officers to execute the contract and arbitration agreement. Rather, the issue decided by the lower court and upon which the Court granted certiorari is whether the particular arbitration provision at issue effected a waiver of sovereign immunity from suit to enforce the arbitration award. *See* Pet. i; Pet. App. 2-7.

After having avoided participating in either arbitration or litigation below, which would have afforded C&L an opportunity to conduct discovery or at least view any evidence Potawatomi might have offered in support of its claim of lack of authority, it is manifestly unfair for Potawatomi to now seek to litigate for the first time whether the officers of its Business Committee were acting within their authority when they executed the formal contract with C&L. Such unfairness and the lack of evidence in the record counsels this Court to follow its customary practice and decline to address this issue in the first instance here. Rather, the Court should review the substance of the arbitration clause as it formed the basis of the lower court's ruling.

III. The Arbitration Agreement Is a Clear and Explicit Waiver of Sovereign Immunity from Suit to Enforce the Contract.

Respondent states:

> The purpose of an arbitration clause is to effect a waiver, but not a waiver of sovereign immunity. By agreeing to arbitration, the parties are mutually waiving whatever rights they had to a trial of disputes arising under the contract.

(Resp.Br. 21).

Notwithstanding this admission, Potawatomi proceeds to argue that the parties waived their rights to a trial but agreed to nothing in its place. Another possible alternative effectively advanced by Potawatomi is that the parties agreed to entry of an arbitration award which would be "final" and that "judgment may be entered upon it," as stated in the arbitration agreement, but that regardless of such terms the arbitration award would in fact only be final if Potawatomi later chose to accept it, again, and judgment could be entered upon the award only if Potawatomi later consented, again, to entry of such judgment. Of course, such a strained effort to parse the elements of the arbitration agreement render it an absurdity.

While Potawatomi is quick to argue, at page 41 of its Brief, that the law regarding waivers of immunity by foreign sovereigns is not applicable to tribal immunity, it has no difficulty attempting to place itself on the same plane with the States which, unlike Indian tribes, enjoy immunity under the Eleventh Amendment. Indeed, as discussed in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), tribal immunity is merely a judicially created doctrine which stands balanced on the "slender reed" of a passing comment from *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919).

Potawatomi spends much of its argument discussing waivers by municipalities and States which have no application to this action. (Resp.Br. 25-33). Potawatomi's discussion of restrictions upon waivers of immunity by

municipalities and States also reverts to arguments of legislative authority. However, Potawatomi admits that the three individuals executing the contract on its behalf were members of the Potawatomi Business Committee and that the Business Committee is "constitutionally authorized by Potawatomi to 'enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation.' " (Resp.Br. 6, n.6). Likewise, Potawatomi admits that its Business Committee has the power and authority to waive sovereign immunity for Potawatomi as is shown by the Resolution attached to Potawatomi's Brief. (Resp.App. 1).

Therefore, the only remaining argument in this regard is not that the Business Committee was acting *ultra vires*, but rather, that the Chairman, Secretary/Treasurer and Councilman members of its Business Committee were not acting with authority from the Business Committee in executing the contract. As discussed above, this is an issue not decided below and which should not be decided in the first instance here.

As to the cases actually on point, Potawatomi unsuccessfully attempts to distinguish the state and Circuit Court decisions finding waivers from arbitration agreements such as the agreement at issue here. Potawatomi argues, that *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), found a waiver of immunity by an Indian tribe because the tribe intervened in a suit. (Resp.Br. 20, n.40).

In fact, the court in *Oregon* found that two theories of consent to suit argued by the parties were each sound:

first, that and Indian tribe's intervention in the suit constituted consent; and second, that the tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1014, 1016.

Potawatomi argues that the courts have misconstrued the holding of the Ninth Circuit Court of Appeals in *Oregon*. To support this, Potawatomi cites *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989).

However, in *Pan American*, the Ninth Circuit specifically recognized the rulings in *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) and *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), each of which, as discussed in the Brief for Petitioner, relied in part upon the Ninth Circuit's opinion in *Oregon* and found "clear" "unequivocal" and "express" waivers of immunity from arbitration agreements.

Given this opening to comment upon *Eyak* and *Val/Del*, and notwithstanding Potawatomi's opinion that these courts had so clearly misconstrued the opinion in *Oregon*, the court in *Pan American* stated no criticism whatsoever of the Alaska and Arizona rulings. The *Pan American* court does not, as Potawatomi states, recognize that state court's had misconstrued its holding in *Oregon*. Given that the *Pan American* court was dealing specifically with an arbitration clause, it is obvious that the court would have criticized the *Eyak* and *Val/Del* holdings

if it believed they were in any way contrary to its ruling or previous holdings.

Rather, the court in *Pan American* declined to find a waiver of sovereign immunity based upon the facts in that case including the language of the arbitration clause at issue. Unlike the clause at issue here, the clause in *Pan American* did not state that the arbitration agreement would be specifically enforceable or that judgment may be entered in court upon any arbitration award. *Pan American,* at 419.

Potawatomi dismisses *Rosebud Sioux Tribe v. Val-U Construction,* 50 F.3d 560 (8th Cir. 1995), *cert. denied,* 116 S.Ct. 78 (1995), with the off-hand comment that "bad facts make bad law." In *Rosebud Sioux,* the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association. Potawatomi attempts to distinguish this clear authority on the basis of the contractor having performed a substantial amount of work in the *Rosebud Sioux* case. However, there is simply nothing in the opinion of the court to indicate that the amount of work performed was a basis for finding the waiver of sovereign immunity.

Potawatomi next criticizes the waiver of sovereign immunity from suit, by consent to arbitration, which was found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association,* 86 F.3d 656 (7th Cir. 1996). Potawatomi admits that the arbitration agreement there was similar to the

agreement at issue herein but speculates that the waiver was probably the result of "equity considerations."

Potawatomi recites a portion of the *Sokaogon* opinion wherein the court characterizes two classes of cases where a clear statement of a waiver of sovereign immunity is required: (1) where Congress is curtailing tribal rights; and (2) where the tribe requires protection from being tricked; that is, as the opinion stated, where protection is needed from:

> . . . the language of the arbitration clause [which] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so.

Id. at 660.

Although the *Sokaogon* court doubts the need for such a requirement in this second class of cases (much like this Court openly debated the basis for tribal immunity in *Kiowa*), the court nevertheless assumed the requirement of a clear and explicit waiver of sovereign immunity and found such a waiver from execution of the arbitration agreement. *Id.*

IV. This Court Should Decline to Consider in the First Instance Whether the Contract at Issue Required Approval under 25 U.S.C. § 81.

Potawatomi alternatively argues that the contract between the parties is void because it was not approved by the Secretary of the Interior under 25 U.S.C. § 81. Although C&L disputes that § 81 is applicable, it agrees with the analysis of the United States at pages 28 and 29

of its Brief as Amicus Curiae supporting the Respondent. That is, this argument advanced by Potawatomi was, as Potawatomi also states, never addressed by the Court of Civil Appeals of Oklahoma or the Oklahoma Supreme Court. The argument is not within the scope of the question on which this Court granted certiorari and therefore should not be addressed here in the first instance. *See* discussion at proposition II above.

Since the contract here is not "relative to their [Indian] lands" as set forth in § 81, Title 25 U.S.C. § 81 is not applicable to the contract and the dispute at issue because: (1) The construction was neither on reservation nor trust land; (2) Respondent did not acquire the exclusive right to manage or operate the facility; (3) The Petitioner was not forbidden to encumber the property; and (4) The operation of the facility, a bank, did not depend on the legal status of the Tribe being a sovereign entity. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993).

Petitioner cites *Narrangansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp 48 (D.R.I. 1988) as "federal jurisprudence" that 25 U.S.C. § 81 pertains to all land owned by Indians regardless of how or when acquired. The single decision from the District Court of Rhode Island simply does not live up to such a characterization.

The court in *Narrangansett* relied upon *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958), finding that 25 U.S.C. § 177 applied to lands acquired by tribes through purchase. In

reaching for such authority, *Narrangansett* assumed incorrectly that the two statutes had a similar purpose of "providing a mechanism to regulate Indian land transactions." *Id.* at 51.

In fact, the two statutes have obviously-different purposes. Discussing the history of 25 U.S.C. § 177, the Tenth Circuit Court of Appeals in *Alonzo* – restating the very "unsolicited paternalism" which Petitioner decries – states:

> The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races' against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo at 196.

By contrast, the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands:

> This delineation of section 81's scope suggests that Congress was concerned about contracts for the representation of Indians' interests . . . legislative history of section 81 shows that 'contractual relations with attorneys and claims agents were foremost on Congress' mind. . . .
>
> . . . .
>
> . . . Congress was concerned specifically about contracts for services such as representation of Indian interests before Congress and the pressing of Indians' claims.

See In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422, 1431, 1432 (D.Minn. 1993).

In light of the obviously-differing purposes of § 81 and § 177, *Narrangansett's* reliance upon *Alonzo* is questionable. Moreover, it is entirely reasonable that even if 25 U.S.C. § 177 restricts conveyances of any lands from Indian tribes, 25 U.S.C. § 81 should and is nonetheless limited to services relative to reservation or trust lands.

Obviously, in any conveyance of land from an Indian tribe it will be known – at the latest upon inspection of the record title to the land – that the land is held by an Indian tribe and that therefore transfer is restricted. On the other hand, since Indian tribes may and often do own land removed from the reservation or trust territory, and since the tribe's ownership of a business on such land may be neither obvious nor expected due to the use of trade names or leases to third parties, it would indeed be an unjust trap for any service provider if Indian tribes could avoid such contracts.

Although most authorities setting forth the factors determining when a service contact is relative to Indian lands relate to management contracts, such analysis has been given broader application. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993) (analysis applied to a manufacturing plant).

Moreover, cases applying § 81 overwhelmingly do so only upon the finding, *inter alia*, that the land involved was "trust" or "reservation" land. *See, e.g., Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993); *Native Village of Eyak*

v. GC Contractors, 658 P.2d 756, 760 (Alaska 1983); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985).

Any doubt that Congress intended that § 81 would apply only to reservation or trust land was resolved with the amendment of the statute in 2000. The current statute now begins as follows:

> (a) In this section:
>
> > (1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

25 U.S.C. § 81.

Finally, in reference to the claim of 25 U.S.C. § 81 application, Respondent specifically alleged below (in the arbitration proceedings, in its Petition and briefing to the Oklahoma County District Court and in briefing to the Oklahoma Court of Appeals) that some or all of the funds used for construction of the bank and its roof were non-tribe funds such as Economic Development Grant or other government grant funds. At no time has Petitioner denied this and therefore the allegation has been admitted and determined in the proceedings below. Therefore, § 81 is not applicable regardless of whether the contract was relative to Indian lands. *See Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc.*, 757 F.2d 221 (10th Cir. 1985).

As urged by the United States in its Brief as Amicus Curiae supporting the Respondent, the Court should

avoid any consideration of § 81 as it was not considered by the courts below. Regardless, the facts known show that § 81 has no application to the non-reservation, non-trust land which related to the construction project at issue.

CONCLUSION

Faced with the virtual unanimity of authority finding that arbitration agreements with language comparable to the agreement at issue constitute a clear and express waiver of sovereign immunity from suit, Potawatomi attempts to argue issues which were not determined by the lower courts and which were not the basis for the ruling being appealed. Moreover, the bulk of such arguments now advanced by Potawatomi would place C&L in the inequitable position of having to argue factual issues for which it never had the benefit of conducting discovery.

Focusing on the actual basis of the ruling of the Oklahoma Court of Civil Appeals, the result below is clearly contrary to the rulings of this Court and the opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, Alaska Supreme Court and Arizona Supreme Court. The Court should reverse the judgment of the Oklahoma Court of

Civil Appeals and remand with instructions to affirm the previous judgments of the District Court of Oklahoma County.

Respectfully submitted,

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In the Supreme Court of the United States

C&L ENTERPRISES, INC., PETITIONER

v.

CITIZEN POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, SECOND DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether or under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to enforcement of an arbitration award entered pursuant to such contract "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court.

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In the Supreme Court of the United States

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CITIZEN POTAWATOMI NATION

ON WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF OKLAHOMA,
SECOND DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question presented by this case is whether or under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to have judgment entered upon the final award by the arbitrator "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court. The United States has a substantial interest in that question due to its special relationship with the Indian Tribes and the congressional policy of encouraging tribal self-determination and economic development. In addition, the United States has an interest in the sound application of principles of foreign sovereign immunity, upon which petitioner relies (Br. 25-27) by analogy in this case. The United States also has an interest in ensuring that arbitration agreements

entered into by the federal government are not erroneously construed as waivers of sovereign immunity from suit. Cf. 28 C.F.R. 50.20(d)(6) (Department of Justice's "consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated.").

STATEMENT

1. a. The Citizen Potawatomi Nation (Tribe) is a federally recognized Indian Tribe that occupies a federally established reservation and other land in central Oklahoma.[1] By virtue of treaties entered into by the United States with the Potawatomi Indians, the federal government has long recognized the Tribe as a "domestic dependent nation," and thus occupies a relationship of trust and protection with the Tribe. See generally *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Today the Tribe is formally organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503, and enjoys all "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 65 Fed. Reg. 13,298, 13,299 (2000).

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[1] The Tribe comprises descendants of Algonquin Indians who centuries ago migrated from the Atlantic seaboard to the eastern Lake Michigan area, where they reportedly were first observed by Europeans in 1640 on islands surrounding Green Bay, Wisconsin. The Potawatomis subsequently entered into treaties with the United States pursuant to which they received federally reserved lands in Mississippi and in Kansas. An 1861 treaty gave the Potawatomi Indians citizenship and land in Oklahoma. The Tribe was known as the Citizen Band Potawatomi Indians of Oklahoma, but in 1996 it changed its name to the Citizen Potawatomi Nation. The Tribe currently has approximately 23,500 members. See Citizen Potawatomi Nation Summary; Potawatomi History <http://www.potawatomi.org.>.

The Tribe is governed by a tribal council comprising members of the Tribe who are 18 years of age or older. See Citizen Potawatomi Nation Const. Art. 5.[2] Tribal members elect a five-person business committee that "is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the [Tribe]." *Id.* Art. 7, § 2. The Tribe's constitution establishes a tribal court system with "courts of general jurisdiction." *Id.* Art. 11, § 2. The Tribe has adopted a corporate charter empowering the Tribe, in its corporate form, "[t]o enter into any obligations or contracts necessary or convenient to the transaction of its ordinary affairs," for "corporate purposes," and for "tribal economic enterprises." Citizen Potawatomi Nation Corporate Charter Art. III(e). The corporate charter authorizes the business committee "[t]o sue and allow the Incorporated Tribe or its agents to be sued by granting an express and unequivocal waiver of sovereign immunity." *Id.* Art. III(b).

b. On August 25, 1993, the Tribe entered into a contract with a private company, petitioner, for the installation of a foam roof on a building that was owned by the Tribe and located on off-reservation, non-trust land owned by the Tribe. See Pet. App. 32-60 (reproducing agreement). The contract was based on a standard form agreement copyrighted by the American Institute of Architects and approved by the Associated General Contractors of America. *Id.* at 32, 33. Among other things, the contract contained the following arbitration provision:

> All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accor-

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[2] The "jurisdiction and governmental powers" of the Tribe extend to persons and property within Indian country, as well as to persons or property beyond the boundaries of Indian country, in accordance with laws of the Tribe, any State, or the United States. Citizen Potawatomi Nation Const. Art. 4, § 2.

> dance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise * * *. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. * * * The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

Id. at 46-47 (Art. 10.8 of contract). A separate provision stated that "[t]he Contract shall be governed by the law of the place where the Project is located." *Id.* at 56 (Art. 19.1).

Before work had begun on the project, the Tribe discovered that it was necessary to change the type of material specified in the contract from foam to rubber guard. The Tribe solicited new bids and ultimately retained another company to install the roof. Petitioner claimed that the Tribe's actions resulted in a breach of the August 25, 1993 contract and, pursuant to the arbitration provision quoted above, submitted an arbitration demand. Pet. App. 13. The Tribe notified the arbitrator in writing that it was asserting sovereign immunity, and that—although the Tribe had substantive defenses to petitioner's arbitration claim—the Tribe therefore would not participate in any arbitration proceedings.[3] On June 30, 1995, the arbitrator entered an award

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[3] The Tribe also argued that the contract was void and unenforceable, because it was not approved by the Secretary of the Interior in accordance with 25 U.S.C. 81. See Br. in Opp. 2 n.3, 3 n.6, 4 n.9. Originally enacted in 1872, Section 81 provides for the Secretary to review and approve certain contracts entered into by Indian Tribes, and provides that contracts "made in violation of this section shall be null and void." 25 U.S.C. 81. As we discuss below, the Oklahoma courts did not address the applicability of

in favor of petitioner in the amount of $25,400 plus attorney's fees and costs. *Id.* at 61-62.

2. a. On August 7, 1995, petitioner filed suit to enforce the arbitration award in the state district court for Oklahoma County, Oklahoma. The Tribe appeared specially and moved to dismiss the petition on the ground that it was immune from suit, arguing that the "boiler-plate language" of the "standard arbitration clause" contained in the contract did not amount to the "unequivocal" waiver of tribal sovereign immunity required by this Court's precedents. Br. in Supp. of Mot. to Dismiss 4. The district court denied the Tribe's motion and its subsequent motion to reconsider that decision. Pet. App. 24-27. On October 27, 1995, the district court entered a judgment confirming the arbitration award, finding that that award "was duly entered, is binding upon the parties and, for good cause shown, should be confirmed." *Id.* at 21-22. In a separate order, the court awarded petitioner attorney's fees and costs. *Id.* at 18.

b. The Oklahoma Court of Civil Appeals affirmed, holding that the fact that the contract was "executed outside of Indian country" disposed of the Tribe's sovereign immunity claim. Pet. App. 14 (quoting *Hoover* v. *Kiowa Tribe*, 909 P.2d 59, 60 (Okla. 1995), cert. denied, 517 U.S. 1188 (1996)). The Tribe unsuccessfully petitioned for review of the court of appeals' decision in the Supreme Court of Oklahoma, then filed a petition for a writ of certiorari in this Court. On June 1, 1998, this Court granted the Tribe's petition, vacated the state court judgment, and remanded for further consideration in light of *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). In *Kiowa Tribe*, discussed at p. 10, *infra*, this Court reaffirmed that Tribes enjoy sovereign immunity from suit except "where Congress has authorized the suit or the Tribe has waived its immunity," and further

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Section 81 to the contract in this case, and that issue is not before this Court. See pp. 28-30, *infra*.

held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 754, 760.

c. On remand, the Oklahoma Court of Civil Appeals held that the Tribe is entitled to sovereign immunity from suit. Pet. App. 2-7. The court of appeals first recognized that under *Kiowa Tribe* the trial court had erred in exercising jurisdiction simply because the contract involved property "outside of Indian Country." *Id.* at 5. Next, the court held that the Tribe had not waived its sovereign immunity from suit by entering into the contract. In so holding, the court observed that "[t]he agreement of [the] Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract" and, thus, might support a waiver "based on implication." *Id.* at 7. But the court concluded that "the contract does not expressly waive [the] Tribe's sovereign immunity." *Ibid.* The court further noted that a "reasonable implication of the language of the contract might be that [the] Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." *Id.* at 7 n.1.

d. The Oklahoma Supreme Court declined to review that decision. Pet. App. 1.

SUMMARY OF ARGUMENT

In *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), this Court reaffirmed that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Under "settled" law, "a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted). Congress's actions in the wake of *Kiowa Tribe* only bolster

the conclusion that Congress adheres to those principles, and this Court accordingly should do likewise. Applying those principles here, the Court should hold that a simple agreement to arbitrate does not waive a Tribe's sovereign immunity from suit and, further, that an agreement to enforcement of arbitration awards "in any court having jurisdiction thereof" does not waive a Tribe's immunity from suit in *state* court, at least when ambiguity exists as to whether the Tribe consented to enforcement actions only in its own courts.

As courts have recognized in the context of foreign sovereign immunity, a simple agreement to arbitrate does not constitute an unequivocal waiver of sovereign immunity from suit. When Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), it carved out an exception to the Act's general rule of immunity of foreign states from suit in the United States for instances "in which [a] foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. 1605(a)(1). In interpreting that provision, federal courts generally have held that an agreement to arbitrate, without more, does not constitute even an *implied* waiver from suit, let alone an express waiver. Congress amended the FSIA in 1988 to provide that a foreign state is not immune from suit when it agrees to arbitrate in a particular manner. 28 U.S.C. 1605(a)(6) (1994 & Supp. IV 1998). By contrast, Congress has not adopted any arbitration exception to the rule of tribal sovereign immunity, and this Court should defer to Congress to decide whether such an exception is appropriate.

The fact that a contract entered into by an Indian Tribe provides for enforcement of arbitration awards "in any court having jurisdiction thereof" does not necessarily mean that any particular court in which an enforcement action is brought actually *has* jurisdiction over such a suit against the Tribe. This Court has recognized that "immunity encompasses not merely *whether* [a sovereign] may be sued, but

where it may be sued." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984). Accordingly, in determining whether a State has waived its Eleventh Amendment immunity from suit in federal court, this Court has been vigilant in ensuring that the State has in fact consented to suit in federal court, rather than only in its own courts. *E.g.*, *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299 (1990). And, in that regard, the Court has recognized that a State does not waive its immunity from suit in federal court "merely * * * by authorizing suits against it 'in any court of competent jurisdiction.'" *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999). Similarly, when a Tribe's own courts have jurisdiction to entertain suits against the Tribe for the enforcement of arbitration awards, an agreement by the Tribe to enforcement of an arbitration award "in any court having jurisdiction thereof" should not necessarily be deemed to be an unequivocal waiver of the Tribe's immunity from suit in state court.

The record in this case does not establish whether the Tribe's courts would have jurisdiction to enforce arbitration awards entered pursuant to the parties' contract, and that issue has not, to this point, been briefed by the parties. Accordingly, this Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals and remand to that court for consideration of that question before deciding whether the arbitration provision in this case unequivocally waives the Tribe's immunity from suit in state court. If such jurisdiction exists in tribal court, it not only would create added ambiguity as to the meaning of the phrase "any court having jurisdiction thereof," on which petitioner heavily relies, but also would answer petitioner's argument that to recognize immunity of the Tribe from suit in state court would render the contract provision superfluous.

Finally, there is no occasion for this Court to decide whether the contract in this case is void or unenforceable on the ground that it was not reviewed or approved by the Secretary of the Interior pursuant to 25 U.S.C. 81. That issue was not decided by either court below. Moreover, while confusion has existed in the past over the reach of Section 81 to certain contracts, Congress has recently amended Section 81 to clarify its scope.

ARGUMENT

PETITIONER HAS NOT ESTABLISHED THE REQUISITE UNEQUIVOCAL WAIVER BY THE TRIBE OF ITS SOVEREIGN IMMUNITY FROM SUIT IN STATE COURT

A. Immunity From Suit Is A Fundamental Attribute Of Indian Tribal Sovereignty, And Any Waiver Of Such Immunity Must Be Unequivocally Expressed

The basic principles governing tribal sovereign immunity run deep throughout this Court's Indian law jurisprudence. First, from the time European settlers first set foot on North America's shores, the Indian Tribes occupying the continent have been regarded as "states" or "nations." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985) (The Indian Tribes are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America."); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). While the original sovereignty of the Tribes was diminished with their loss of complete territorial dominion over the land, Tribes retain a sovereign status as "domestic dependent nations" under the dominion and protection of the United States. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian*

Tribe, 498 U.S. 505, 509 (1991); *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978).

Second, as an attribute of their inherent sovereignty, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). See *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); see also *Alden* v. *Maine*, 527 U.S. 706, 716 (1999) (quoting *The Federalist* No. 81, at 548-549 (A. Hamilton) (J. Cooke ed., 1961) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.*")). This Court recently reaffirmed that "settled law" in *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756 (1998), where the Court laid to rest any doubt over the continuing validity of the doctrine of tribal immunity from suit in light of the modern economic activities undertaken by many Tribes, and reiterated that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe* further established that Indian Tribes do not forfeit their immunity from suit when they engage in commercial activities or contract for goods or services outside of Indian country. See *id.* at 754-756, 758-759.

Third, "[i]t is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). See *Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe."); see also *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 512-513 (1940). That understanding is consistent with the approach this Court follows in determining whether other sovereigns have relinquished their

sovereign immunity from suit. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 682 (1999) (state agency); *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 300 (1990) (state instrumentality); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-443 (1989) (foreign state); *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (United States) (quoted in *Santa Clara Pueblo*, 436 U.S. at 58).

This case calls for application of those familiar principles to the narrow question whether—and, if so, under what circumstances—an Indian Tribe's agreement to arbitrate disputes under a contract with a private party, and to enforcement of arbitration awards entered pursuant to such a contract in "any court having jurisdiction thereof," constitutes an unequivocal waiver of the Tribe's sovereign immunity from suit in state court.[4]

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[4] In cases such as this one involving a purported waiver by contract of the Tribe's sovereign immunity from suit, there may be a threshold question as to whether the Tribe has authorized the alleged waiver of immunity by tribal officials. See, *e.g.*, *Hydrothermal Energy Corp.* v. *Fort Bidwell Indian Cmty. Council*, 216 Cal.Rptr. 59, 63 (Ct. App. 1985). For example, like the United States and presumably most state governments, many tribal governments may waive their sovereign immunity only by legislative act. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 468 (1945); *Seminole Police Dep't* v. *Casadella*, 478 So.2d 470, 471 (Fla. Ct. App. 1985). That requirement ensures careful consideration—by the sovereign—of the terms and conditions of the waiver, as well as whether any waiver is appropriate at all. In addition, even if specific legislative authorization is not required, there may be a dispute over whether the persons who entered into a contract in fact had the authority to act on behalf of the Tribe, including to waive the Tribe's immunity from suit. Compare *United States Fidelity & Guar. Co.*, 309 U.S. at 513 & n.14. In the trial court, the Tribe in this case argued that a factual dispute exists as to whether the contract was authorized or approved by the Tribe in accordance with tribal regulations. Br. in Supp. of Mot. to Dismiss 5-6 & n.19. But it was unnecessary for the state courts to reach that question,

B. There Is No Occasion For This Court To Reconsider The *Doctrine Of Tribal Sovereign Immunity That Was Reaffirmed In *Kiowa Tribe*

Petitioner first argues (Br. 13) for the application of a watered-down version of the tribal immunity doctrine, asserting that this Court's decisions establish a "marked movement away" from recognizing Indian sovereign immunity "toward broader exertion of jurisdiction over Indian tribes," "especially * * * in actions concerning commercial activities off of the reservation." The Court's recent decision in *Kiowa Tribe*—in which the same theory was advanced by the respondent, at much greater length—is a complete answer to that argument. There, the Court reaffirmed that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U.S. at 760. Petitioner offers no justification for the Court to revisit *Kiowa Tribe* practically before its ink has dried. And, in fact, Congress's actions since *Kiowa Tribe* only bolster the case for continued judicial adherence to the "settled" doctrine of tribal sovereign immunity that was reaffirmed in *Kiowa Tribe*. *Id.* at 756.

In *Kiowa Tribe*, this Court observed that the ultimate decision whether to alter the scope of tribal sovereign immunity is for Congress, the Branch that "is in a position to weigh and accommodate the competing policy concerns and reliance interests" affected by that doctrine. See 523 U.S. at 759-760. Since *Kiowa Tribe* was decided, Congress has not restricted the scope of the tribal immunity doctrine, and recent legislation expressly confirms that Congress still recognizes that doctrine. The Indian Tribal Economic Development and Contracts Encouragement Act of 2000 (2000 Act),

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because the Oklahoma Court of Civil Appeals held that the Tribe was entitled to sovereign immunity on other grounds.

Pub. L. No. 106-179, § 2(d)(2)(A)-(C), 114 Stat. 46, discussed further at p. 29, *infra*, amended 25 U.S.C. 81 to require the Secretary of the Interior to disapprove a contract encumbering tribal land whenever such a contract does not include a provision that "provides for remedies in the case of a breach of the agreement or contract," "references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe," or "includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action)."

The legislative history of the 2000 Act shows that Congress was fully aware of the *Kiowa Tribe* decision when it imposed that added requirement. See S. Rep. No. 150, 106th Cong., 1st Sess. 11 (1999) (discussing Justice Stevens' dissent in *Kiowa Tribe*). Furthermore, the legislative history demonstrates that Congress—after having "held extensive hearings on tribal sovereign immunity," *id.* at 11 & n.28—has determined that it is beneficial for contracting parties to deal "directly" with the issue of tribal sovereign immunity from suit. *Id.* at 12; see also *id.* at 11 (The approach adopted by the Act "builds upon an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed."). The doctrine of tribal sovereign immunity articulated by this Court advances that same policy by requiring that any waiver of tribal immunity "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted).[5]

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[5] While the amici States object to the result in *Kiowa Tribe*, they acknowledge that, in the wake of that decision, this case must be decided

C. An Indian Tribe's Agreement To Arbitrate A Dispute Does Not, Without More, Constitute A Waiver Of Its Sovereign Immunity From Suit In Court

In *Kiowa Tribe*, this Court observed that the manner in which Congress has addressed "the problems of sovereign immunity for foreign countries" may be "instructive" in resolving tribal sovereign immunity questions. 523 U.S. at 759. Relying on the Restatement (Third) of the Foreign Relations Law of the United States (1986), petitioner argues (Br. 25-27) that the practice with respect to foreign states supports the conclusion that a Tribe's agreement to arbitrate a dispute waives its sovereign immunity from suit. The Restatement (§ 456(2)(b)(ii)) does state that "an agreement to arbitrate is a waiver of immunity from jurisdiction" in an "action to enforce an arbitral award." But the Restatement was not fashioned by Congress and, in fact, when it comes to *Congress's* actions, the law of foreign sovereign immunity strongly supports the conclusion that a simple agreement to arbitrate does not constitute a valid waiver of sovereign immunity from suit.

1. a. Congress comprehensively addressed the subject of foreign sovereign immunity from suit in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* As this Court has observed, Congress intended the FSIA to "be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic*, 488 U.S. at 434. Under the FSIA, a foreign state retains its immunity from suit in the United States unless the suit fits within one of the exceptions established by the Act. See 28 U.S.C. 1604 (general rule of immunity), 1605 (exceptions). In particular,

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based on application of the same basic principles set forth in the text (see pp. 9-11, *supra*), including the established principle governing a Tribe's waiver of its immunity. See Br. for Amici Texas *et al.* 3-5; *id.* at 4 ("An Indian tribe may waive its tribal immunity, but the waiver 'must be unequivocally expressed.'") (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

when Congress enacted the FSIA, it expressly abrogated foreign sovereign immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. 1605(a)(1). The House Report accompanying the Act stated that "[w]ith respect to *implicit* waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (emphasis added).

Notwithstanding that legislative history, the vast majority of courts applying the FSIA have concluded that an agreement to arbitrate in another country is insufficient to establish even an *implied* waiver for purposes of Section 1605(a)(1), because "[s]uch an interpretation of §1605(a)(1)'s 'implicit waiver' exception would vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations." *Seetransport Wiking Trader* v. *Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993). See *Creighton Ltd.* v. *Government of the State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999) ("We follow the Second Circuit in rejecting such a broad reading of the 'implicit waiver' exception" to arbitration agreements.); *S & Davis Int'l, Inc.* v. *Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000) (following *Creighton*); *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993); *Zernicek* v. *Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1985), aff'd, 826 F.2d 415 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); see also *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985); *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1102 n.13 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). Similarly, in *Argentine Republic*, 488 U.S. at 442-443, this Court rejected the argument that "a foreign state can waive its immunity under § 1605(a)(1) by signing an international agree-

ment that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."

b. In 1988, Congress amended the FSIA to add the following express exception to Section 1605(a):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

28 U.S.C. 1605(a)(6) (1994 & Supp. IV 1998), added by Pub. L. No. 100-669, § 2, 102 Stat. 3969.

2. For several reasons, the foregoing statutory history is instructive with respect to the tribal sovereign immunity question presented in this case. First, there is virtually no support under the FSIA for the proposition that a simple agreement to arbitrate constitutes an *express* waiver of sovereign immunity. Second, while the legislative history of the FSIA indicates that Congress believed that an agreement to arbitrate in another country might amount to an

"*implicit* waiver[]" of immunity from suit in United States courts, H.R. Rep. No. 1487, *supra*, at 18 (emphasis added), the federal courts, as discussed above, have generally rejected that notion. It follows, *a fortiori*, that a simple agreement to arbitrate does not constitute a waiver of tribal sovereign immunity, because, as this Court has held, a "waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted).

Third, the fact that Congress has carved out an explicit arbitration exception to foreign sovereign immunity but has not done so with respect to tribal sovereign immunity strongly counsels against judicial creation of an arbitration exception in this case. Section 1605(a)(1) and (6) of the FSIA establish both that Congress does not equate an agreement to arbitrate with an express waiver of sovereign immunity, and that Congress knows how to abrogate sovereign immunity when it wants to in the case of arbitration agreements. As this Court recognized in *Kiowa Tribe*, 523 U.S. at 758-759, Congress has restricted tribal sovereign immunity in several particular contexts, *e.g.*, 25 U.S.C. 450f(c)(3), 2710(d)(7)(A)(ii), and it has declared its intention not to alter such immunity in others, *e.g.*, 25 U.S.C. 450n. See also *Potawatomi*, 498 U.S. at 510 ("Congress has consistently reiterated its approval of the [tribal] immunity doctrine."). Congress has not, however, adopted any arbitration exception to the rule of tribal sovereign immunity.

This Court should do as it did in *Kiowa Tribe* and "defer to Congress" (523 U.S. at 760) to decide whether it is appropriate to restrict tribal sovereign immunity in this area and, unless Congress so acts, apply the settled rule that waivers of tribal immunity from suit "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). The fact that Indian Tribes may thus enjoy a broader form of immunity from suit in the

arbitration context than that possessed by foreign states does not justify a different conclusion. As the Court recognized in *Kiowa Tribe*, under the FSIA Congress has abrogated the immunity of foreign states from suit with respect to commercial activities. See 523 U.S. at 759; 28 U.S.C. 1605(a)(2). Congress has not, however, abrogated the sovereign immunity of Indian Tribes in connection with commercial activities. Accordingly, in *Kiowa Tribe*, this Court held that Tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities." 523 U.S. at 760.[6]

D. The Contract Provisions Relied Upon By Petitioner Do Not Constitute Unequivocal Consent To Suit In State Court If An Enforcement Action May Be Brought In Tribal Court

1. While the Court does not require a sovereign to invoke particular words or phrases when it desires to waive its sovereign immunity from suit, the standard established by this Court's precedents for determining whether a Tribe has waived such immunity is stringent: "[i]t is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted); *Felix Cohen's Handbook of Federal Indian Law* 324 (R. Strickland *et al.* eds., 1982) (1982 Cohen); *College Sav. Bank*, 527 U.S. at 678 ("[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence."); *Black's Law Dictionary* 1370 (5th ed. 1979) ("unequivocal" means "[c]lear; plain; capable of being understood in only one way

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[6] In *Hydaburg Cooperative Ass'n* v. *Hydaburg Fisheries*, 826 P.2d 751, 753 (1992), the Alaska Supreme Court relied on Section 456 of the Restatement in concluding that an agreement to arbitrate waives tribal immunity from suit. In so holding, however, the court did not discuss any of the considerations discussed above based on the text, legislative history, or judicial interpretation of the FSIA.

* * * or without doubt").[7] As noted above, the standard applied by this Court in determining whether the United States or the States and their instrumentalities have waived their sovereign immunity from suit is similarly strict. See pp. 10-11, *supra*; note 10, *infra*.

Nothing in the contract in this case explicitly addresses the Tribe's sovereign immunity from suit, or explicitly states that the Tribe has waived that immunity. As a result, in arguing that the Tribe has waived its immunity from suit, petitioner points (Br. 16-17) to the contract terms quoted above (pp. 3-4, *supra*) that provide for arbitration (Art. 10.8), enforcement of arbitration awards "in any court having jurisdiction thereof" (Art. 10.8), and choice of law (Art. 19.1). In addition, petitioner (Br. 17) goes beyond the four corners of the contract and relies on provisions of the Oklahoma Uniform Arbitration Act. See Pet. Br. 2-3. We agree with the state court below that, when strung together, those provisions might establish "a waiver * * * based on implication." Pet. App. 7. But, as discussed above, implication has never been sufficient under this Court's precedents to establish a valid waiver of tribal sovereign immunity. See pp. 10-11, *supra*; *Pan American Co.* v. *Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ("Consent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*" that "tribal sovereign

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[7] Consistent with the rule that a waiver of sovereign immunity must be *express*, the Court has declined to rely on secondary sources to establish a waiver. See *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text.'") (quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). There is no reason to adopt any different approach with respect to alleged waivers that do not appear clearly in any contractual text.

immunity remains intact unless surrendered in express and unequivocal terms.").[8]

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[8] In *Pan American*, the court of appeals refused to conclude that an Indian Tribe's agreement to arbitrate disputes arising out of a contract and to subject itself "to the jurisdiction of the American Arbitration Association" and its rules waived the Tribe's sovereign immunity from suit. 884 F.2d at 419 (quoting agreement). At most, the court held, such an agreement supported a waiver by implication, but not the "express and unequivocal" waiver required by this Court. *Ibid.* The fact that that interpretation might leave a party "without judicially enforceable remedies" for breach of the underlying contract did not justify finding a waiver. *Ibid.* As the court explained, "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Ibid.* (citing *United States Fidelity & Guar. Co.*, 309 U.S. at 513). See also, *e.g.*, *Calvello* v. *Yankton Sioux Tribe*, 584 N.W.2d 108, 113 (S.D. 1998) ("for purposes of sovereign immunity, consent to arbitrate is not consent to a lawsuit") (citing *Pan American*, 884 F.2d at 418-419); *Danka Funding Co.* v. *Sky City Casino*, 747 A.2d 837, 840, 844 (N.J. Super. 1999).

Some lower courts have reached a contrary conclusion, holding that Indian Tribes waived their immunity from suit by agreeing to contractually binding arbitration provisions. See, *e.g.*, *Sokaogon Gaming Enter. Corp.* v. *Tushie-Montgomery Assocs.*, 86 F.3d 656, 660 (7th Cir. 1996); *Rosebud Sioux Tribe* v. *Val-U Constr. Co.*, 50 F.3d 560, 562-563 (8th Cir.), cert. denied, 516 U.S. 819 (1995); *Native Village of Eyak* v. *GC Contractors*, 658 P.2d 756, 760 (Alaska 1983). In so holding, however, those courts did not discuss the principles established by foreign sovereign immunity law, discussed above (pp. 14-18, *supra*), or by this Court's Eleventh Amendment immunity precedents, discussed below (pp. 22-26, *infra*). Instead, the courts approached the waiver issue from the standpoint of a more conventional contract analysis. In addition, those lower court decisions—which were decided prior *Kiowa Tribe*—may have been at least partly influenced by doubts as to whether Indian Tribes enjoy their traditional immunity from suit when they engage in business transactions. Cf. *Sokaogon Gaming*, 86 F.3d at 659-660 (expressing "doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit" in a "business" contract). As discussed above, however, any such doubts were eliminated by *Kiowa Tribe*.

Petitioner (Br. 29) and the amici States suggest that it is "nearly impossible" for a Tribe to waive its sovereign immunity from suit in clearer terms. Br. for Amici Texas *et al.* 13 (internal quotation marks omitted). But experience proves the contrary. See, *e.g.*, Heidi L. McNeil, Practising Law Institute, *Corporate Law and Practice Course Handbook Series, Doing Business in Indian Country* 20-25 (Dec. 1994) (quoting model provisions waiving a Tribe's sovereign immunity); *Bruce H. Lien Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1415 n.4 (8th Cir. 1996) (quoting waiver provision); *Bank of Okla.* v. *Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992) (same); see also *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) ("[T]he Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court."), aff'd, 455 U.S. 130 (1982).[9]

Moreover, it is not surprising that the contract in this case does not explicitly address the sovereign immunity of the Tribe; the contract is based on a standard form agreement copyrighted by the American Institute of Architects. See Br. in Opp. 12; Pet. App. 33. In the vast majority of cases, that form agreement is used by private parties who do not

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[9] In *Nevada* v. *Hicks*, cert. granted, No. 99-1994 (Oct. 10, 2000), the Fallon Paiute-Shoshone Tribe made a similarly explicit waiver of sovereign immunity. See 99-1994 Pet. App. B4; Resolution No. 94-F-074 of the Tribe (June 28, 1994), attached to the Tribal Defendant's Answer, *Nevada* v. *Hicks*, No. CV-N-94-351-DWH (D. Nev.) (filed July 11, 1994) ("Now therefore be it resolved that the Fallon Business Council hereby waives the sovereign immunity from suit in federal court of the Tribal Court and the Tribal Judge Joseph Van Walraven for the limited purpose of remaining in the federal court action * * * to defend the claims for non-monetary declaratory relief raised by the plaintiffs regarding the issue of tribal court civil jurisdiction over the underlying action against state officials.").

possess any sovereign immunity, and the form presumably was drafted with those private parties in mind. When considered against that backdrop, there is further reason to question whether the contract in this case should be regarded as an unequivocal expression of a waiver of tribal sovereign immunity. As we explain below, however, there is no reason to resolve that question here because, at least as this case comes to this Court, the agreement does not in any event unequivocally express the consent of the Tribe to be sued in *state* court.

2. a. Even when a sovereign has unequivocally consented to suit, this Court is vigilant in ensuring that the sovereign has consented to suit in courts other than its own. As the Court has observed in the Eleventh Amendment context, a "State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99.

Thus, for example, in *Feeney*, 495 U.S. at 306, this Court refused to conclude that States had consented to suit in *federal* court simply because they had "expressly consented to suit in expansive terms." The waiver provision in *Feeney* stated "that the States 'consent to suits, actions, or proceedings of *any* form or nature at law, in equity or otherwise . . . against the Port of New York Authority.'" *Ibid.* (quoting state statute; emphasis added). Only the fact that a separate provision of state law expressly consented to venue in a "'judicial district * * * established by * * * the United States,'" justified the conclusion that the States had waived their immunity from suit in *federal* court, rather than just in their own courts. *Id.* at 307-308 (quoting statute). See also, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) (consent-to-suit provision does not waive Eleventh Amendment immunity, because it "does not specifically indicate the State's willingness to be sued in federal court"); *Florida Dep't of Health* v. *Florida Nursing*

Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944); *Smith* v. *Reeves*, 178 U.S. 436, 441 (1900).

While Indian Tribes, which were not parties to the constitutional convention, do not possess Eleventh Amendment immunity from suit, they do possess a federally-protected sovereign immunity from suit. In deciding whether or when to relinquish that immunity, the sovereign Tribes share the interests of the sovereign States in avoiding suit in foreign tribunals.[10] Furthermore, because the sovereignty of Indian Tribes has always included as bedrock elements a separation from the jurisdiction of the State and an immunity from its laws, see, *e.g.*, *Worcester* v. *Georgia*, *supra*; *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867); *United States* v. *Kagama*, 118 U.S. 375, 755 (1886), courts must be especially reluctant to construe ambiguous expressions as consent by a Tribe to be sued in state court.

No provision of the contract in this case explicitly refers to jurisdiction or venue in the Oklahoma state courts. Petitioner relies heavily on the fact that the arbitration provision (Art. 10.8) makes arbitration awards enforceable in "any court having jurisdiction thereof." But that language only

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[10] This Court applies the same stringent standard in determining whether a State has waived its Eleventh Amendment immunity from suit as it does in determining whether an Indian Tribe has waived its sovereign immunity from suit—*i.e.*, "[i]n the absence of an *unequivocal* waiver," the Court "decline[s] to find that [a state] has waived its * * * immunity." *Atascadero State Hosp.*, 473 U.S. at 241 (emphasis added). See also *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 397 (1998) ("[T]he Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit be unequivocal") (Kennedy, J., concurring). As a result, the Court's Eleventh Amendment waiver jurisprudence is instructive here; the meaning of "unequivocal" should not fluctuate between the Eleventh Amendment immunity and tribal sovereign immunity contexts.

begs the question whether the state courts have jurisdiction in the first place—notwithstanding the Tribe's customary sovereign immunity from suit in those courts. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). To answer that problem, petitioner turns (Br. 16-17) to the contract's choice-of-law provision (Art. 19.1), and argues (Br. 17) that "[b]y operation of the Oklahoma Uniform Arbitration Act * * *, jurisdiction was properly exercised by the Oklahoma State Court." But the Oklahoma Uniform Arbitration Act presents the same problem as the contract; it merely provides for enforcement of arbitration awards in a "court of competent jurisdiction." Okla. Stat. tit. 15, § 802(B) (1993) (quoted at Pet. Br. 2).[11] Petitioner's reliance on the application of Oklahoma law is further undercut by Congress's approach in the context of foreign sovereign immunity. As discussed above (see p. 15, *supra*), the history of the FSIA indicates that, at most, Congress regarded the fact that a sovereign "has agreed that the law of a particular [sovereign] should govern a contract" as evidence of an "*implicit* waiver." H.R. Rep. No. 1487, *supra*, at 18 (emphasis added).

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[11] Section 802(B) of the Oklahoma Act goes on to state that "[t]he making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." Okla. Stat. tit. 15, § 802(B) (1993). But the Oklahoma legislature cannot abrogate the sovereign immunity of Indian Tribes that enter into arbitration agreements subject to Oklahoma law, any more than it can abrogate their sovereign immunity from suit in Oklahoma courts altogether. See *Three Affiliated Tribes*, 476 U.S. at 891 ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."). Nor, for similar reasons, may the State deem a Tribe's making of an agreement that provides for arbitration to be a constructive waiver of the Tribe's sovereign immunity from suit. See *College Sav. Bank*, 527 U.S. at 676-686.

b. As the Oklahoma Court of Civil Appeals observed, while the record in this case "does not give us any information regarding the Tribe's legal system," a "reasonable implication of the language of the contract might be that [the] Tribe's own courts are the 'court[s] having jurisdiction thereof' mentioned in the contract." Pet. App. 7 n.1. If that is so, then the Tribe has not unequivocally waived its sovereign immunity from suit in state court. That conclusion squares with the approach taken by this Court in *Feeney* and the other Eleventh Amendment immunity decisions cited above in determining whether "expansive" (*Feeney*, 495 U.S. at 306) consent-to-suit provisions waived a State's immunity from suit in federal as well as state courts. See p. 22, *supra*.

Moreover, in the Eleventh Amendment context, this Court has repeatedly recognized that a State does not waive its immunity from suit in federal court "merely * * * by authorizing suits against it 'in any court of competent jurisdiction.'" *College Sav. Bank*, 527 U.S. at 676 (citing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946)); *Ford Motor Co.*, 323 U.S. at 465; cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 75 (2000) (federal statute providing for suit in "'in any *Federal or State* court of competent jurisdiction' * * * eliminates the ambiguity identified in *Kennecott Copper*—whether Utah intended to permit suits against the sovereign in state court only, or in state and federal court") (emphasis added); *Employees of the Dep't of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279, 287 (1973). Those precedents establish a general rule of construction that, out of respect for state sovereignty, a State's consent to suit in "any court of competent jurisdiction" should be construed narrowly as the State's consent to be sued in its *own* courts of competent jurisdiction, and not its consent to be subjected to suits in *another* sovereign's courts.

At a minimum, those Eleventh Amendment precedents demonstrate that the phrase "any court having jurisdiction thereof" in the arbitration clause at issue in this case does not have the touchstone significance that petitioner assigns to it in arguing that the Tribe has waived its sovereign immunity from suit in the Oklahoma courts.[12] That conclusion, moreover, promotes "proper respect for tribal legal institutions" and tribal sovereignty. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 16 (1987). As this Court has explained, "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (citation omitted). See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. at 856; *United States* v. *Wheeler*, 435 U.S. at 332. Just as proper respect for state sovereignty calls for construing a State's consent to suit in "any court of competent jurisdiction" as consent to suit only in its own courts and not federal courts, proper respect for tribal sovereignty warrants construing that language as consent to suit only in a Tribe's own courts and not state courts. The same or similar language should not be read one way for purposes of waiving Eleventh Amendment immunity and another for purposes of waiving tribal sovereign immunity. See note 10, *supra*.

c. As this case comes to this Court, it is not clear whether the Tribe's own courts would have jurisdiction to adjudicate disputes arising under the contract at issue or to

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[12] When it comes to their *own* immunity, the amici States are more sensitive to the ambiguity inherent in the "any court having jurisdiction thereof" language. See Br. for Amici Texas *et al.* 17 n.11 ("Of course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts."). Similarly, the same language should have no effect on a Tribe's immunity from suit in state court unless it unequivocally evidences the Tribe's consent to suit in state court.

enforce arbitration awards entered under that contract. The availability of tribal court jurisdiction, however, would refute petitioner's contention that the contract provisions on which it relies—which do not mention state courts—must be read to waive the Tribe's immunity from suit in state court. Until the question of the availability of a tribal forum is resolved, moreover, it is not possible to decide whether a determination that the Tribe is immune from suit in state court would render the enforcement provision of the arbitration clause involved in this case without operative effect. Accordingly, if the Court is not able to resolve the question of the availability of tribal court jurisdiction in the current posture of the case, the Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals and remand the case to that court for consideration of the availability of tribal court jurisdiction in these circumstances or for referral of that question to the tribal court. Cf. *Fiore* v. *White*, No. 98-942, 2001 WL 15674 (Jan. 9, 2001).[13]

At the very least, the Court should make clear that an Indian Tribe's agreement to arbitrate disputes arising out of a contract with a private party, and to enforcement of arbitration awards "in any court having jurisdiction thereof," should not be construed as an unequivocal waiver of sovereign immunity from suit in state court when it is evident that the Tribe's own courts would have jurisdiction to entertain enforcement actions.

3. Important policy considerations support a narrow construction of purported waivers of tribal sovereign immunity from suit, in accordance with this Court's settled practice. As this Court has recognized, Congress's consistent recognition of and support for tribal sovereign immunity has been

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[13] As pointed out above, the Oklahoma Court of Civil Appeals specifically noted this issue, but it did not resolve it because the court concluded that the alleged waiver was inadequate in other respects urged by the Tribe. See Pet. App. 7 n.1.

predicated in part on its "desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). Those goals could be compromised by exposing Tribes to the burdens of litigation and the enforcement of money judgments against tribal treasuries, including the seizure of tribal tax revenues.[14] Governments traditionally have been cautious in waiving their immunity from suit and exposing themselves to suits for money damages. But tribal governments have reason to be especially reluctant to do so: in the case of many Indian Tribes, with relatively small membership rolls and operating budgets, a single damages award could seriously threaten the Tribe's very existence. Cf. *Santa Clara Pueblo*, 436 U.S. at 65 n.19.

E. The Court Should Decline To Consider In The First Instance The Applicability Of 25 U.S.C. 81 To The Parties' Contract

The Tribe alternatively argued in the courts below that the arbitration award in this case should not be enforced on the ground that the underlying contract is void and unenforceable for lack of approval by the Secretary of the Interior in accordance with 25 U.S.C. 81. See Br. in Opp. 2 n.3, 3 n.6, 4 n.9; note 3, *supra*. That argument was not addressed by the courts below and it is not within the scope of the question on which this Court granted certiorari, which is limited to whether the contract's arbitration provision effects a waiver of the Tribe's sovereign immunity. See Pet. i. This Court should decline to address that issue in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 469-

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[14] Where an Indian Tribe has waived its immunity from suit in its corporate capacity, only assets held by the Tribe in that capacity would be available to satisfy a judgment entered against the Tribe. See 1982 Cohen, *supra*, at 325-326.

470 (1999) (refusing to reach "alternative theories" advanced by respondent in defending judgment in this Court, when theories were not decided below) (citing cases); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below.").

The Court's traditional reluctance to address questions that were not passed upon below is particularly warranted here. Section 81 was first enacted in 1872, in an era in which the economic independence and role of Indian Tribes bore little resemblance to the circumstances of many Tribes today. Section 81 obligated the Secretary of the Interior to review and approve certain contracts made with Indian Tribes, and provided that contracts "made in violation of this section shall be null and void." 25 U.S.C. 81. While historically most contracts that have been reviewed by the Secretary pursuant to Section 81 have concerned tribal trust lands or trust funds—categories that do not cover the contract in this case—confusion has arisen over the past century regarding the reach of Section 81. See S. Rep. No. 150, *supra*, at 2-7 (discussing background of Section 81); 65 Fed. Reg. 43,952 (2000) (discussing "confusion over exactly what contracts Section 81 did or did not cover"). This past year, Congress amended Section 81 and clarified its application to tribal contracts. 2000 Act, § 2, 114 Stat. 46.

As amended, Section 81 requires secretarial approval only of tribal contracts "that encumber[] Indian lands for a period of 7 or more years." 2000 Act, § 2(b), 114 Stat. 46. The term "Indian lands" is defined as trust lands and tribal lands "subject to a restriction by the United States against alienation." § 2(a)(1), 114 Stat. 46. That intervening amendment clarifying Congress's intent provides another compelling reason for this Court to "deal with the case as it came here and affirm or reverse based on the ground relied on below," *Peralta*, 485 U.S. at 86, and thereby avoid any consideration of

Section 81 that might cast doubt on the validity of contracts (such as the one at issue here) that were entered into prior to the 2000 amendment.

CONCLUSION

The Court should hold that if the arbitration agreement or award in this case could be enforced in tribal court, the Tribe has not unequivocally waived its sovereign immunity from suit in state court. The Court may wish to vacate the judgment of the Oklahoma Court of Civil Appeals in this case and remand the case to that court for consideration in the first instance of the availability of a forum in tribal court, or for referral of that issue to the tribal court.

Respectfully submitted.

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No. 00-292

In the Supreme Court of the United States

C&L ENTERPRISES, INC.,
Petitioner,

v.

CITIZEN POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the
Court of Civil Appeals of Oklahoma,
Second Division

AMICUS CURIAE BRIEF OF TEXAS, ALABAMA, ARKANSAS, KANSAS, MISSISSIPPI, NEBRASKA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the arbitration clause and the enforcement provisions of the construction contract between the Citizen Potawatomi Nation and C&L Enterprises, Inc., expressly waive the tribe's immunity from suit in state court?

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Tribal immunity is a well-established adjunct of tribal sovereignty; but inherent in the very notion of sovereignty is the authority and discretion to choose to waive that immunity. The courts have long recognized that the United States, the states, and even foreign countries can waive their sovereign immunity from suit by clearly expressing an intent to be subject to suit, even without the use of particular words or phrases. The Court should not adopt a more stringent standard solely for waivers of immunity by Indian tribes. Indeed, given the extraordinarily weak justification for any immunity in the context of purely commercial tribe-owned businesses, the Court should reject respondent's arguments for a paternalistic brand of immunity that must be protected

against a tribe's own efforts to waive it. For the reasons stated below, the amici states believe respondent waived its tribal immunity from suit when it entered into a construction contract with C&L Enterprises that provided for binding arbitration and for the entry of judgment on the arbitration award. Amici urge the Court to reverse the judgment of the Second Division of the Court of Civil Appeals of Oklahoma.

INTEREST OF AMICI

Although tribal immunity is a question of federal law, the amici states have a strong interest in ensuring that Indian tribes and tribal businesses comply with generally applicable, nondiscriminatory civil laws. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). The states have a distinct interest in providing a judicial forum for the fair and equitable resolution of civil contractual disputes between their non-Indian citizens and Indian tribes, particularly when the terms of a disputed contract clearly manifest the tribe's intent to waive its tribal immunity by subjecting itself to binding arbitration.

SUMMARY OF ARGUMENT

The validity of a contractual waiver of tribal immunity should be evaluated by the intent expressed in the language of the contract, not by whether specific language was used to express that intent. Contrary to the holding of the court of appeals, the tribe's stated willingness to be subject to suit on the contract was an express, not an implied, waiver of its immunity from suit. A contractual provision stating "you may sue us on this contract" is not functionally different from a provision stating "we waive our tribal immunity from suit."

The Court has previously noted that tribal immunity for commercial ventures is an anachronistic doctrine predicated on dubious legal and policy underpinnings. Although the Court has left to Congress the task of limiting or modifying tribal immunity in that context, it would be both unwise and inequitable to expand the unfair consequences of the doctrine by judicially restricting the validity of a tribe's objectively ascertainable intent to waive its immunity. Moreover, because tribal sovereignty contemplates the ability not only to assert but also to waive tribal immunity, respect for tribal sovereignty requires the Court to give effect to a tribe's waiver of its immunity from suit. To do otherwise would unfairly harm those who contract with tribal businesses believing they can rely on the plain meaning of a contract and, ultimately, the tribe's ability to contract with non-Indian citizens or businesses.

In the contract at issue in this case, respondent expressly agreed to binding arbitration and to judicial enforcement of any arbitration award. The court of appeals correctly noted that the contractual language "indicate[d] a willingness on Tribe's part to expose itself to suit on the contract." Pet. App. 7. It should have understood that nothing more was required. The Court should reverse the judgment below.

ARGUMENT

Indian tribes are considered "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *see Oklahoma Tax Comm'n*

v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 172 (1977).[1]

An Indian tribe may waive its tribal immunity, but the waiver "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S., at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).[2] Amici believe that respondent

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1. In *Kiowa*, the Court traced the historical development of tribal immunity. *See Kiowa*, 523 U.S., at 756-58 (discussing *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940), and *Turner v. United States*, 248 U.S. 354 (1919)). Although the Court noted that tribal immunity "developed almost by accident" and questioned "the wisdom of perpetuating the doctrine," the Court retained the anachronistic doctrine of tribal immunity, deferring to Congress to abrogate or modify the parameters of tribal immunity. *Id.*, at 757-58.

2. The Seventh Circuit has questioned "whether there really is a requirement that a tribe's waiver of sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996) (contrasting the requirement for congressional abrogation of tribal immunity set forth in *Santa Clara Pueblo* with an express waiver of tribal immunity by the tribe itself); *but see Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.* (*In re Ransom*), 658 N.E.2d 989, 993 n.4 (N.Y. 1995) ("[A]t least one Federal Circuit Court of Appeals has ruled that regardless of whether the waiver is externally imposed by Congress or by an act of the tribe itself, there is no distinction in the requirement of an explicit and unequivocal

expressly waived its immunity in the contractual arbitration clause at issue in this case. Amici urge the Court to reject respondent's arguments to judicially limit the validity of an attempted waiver of immunity through an artificially heightened standard for evaluating claimed waivers of immunity.

I. NEITHER PRECEDENT NOR PUBLIC POLICY JUSTIFY LIMITING A TRIBE'S ABILITY TO WAIVE ITS IMMUNITY.

The Bureau of Indian Affairs currently recognizes over 550 Indian tribes in the contiguous 48 states and Alaska. *See* Notice of Indian Entities Recognized and Eligible to Receive Services, 65 Fed. Reg. 13298-303 (Mar. 13, 2000).[3] With the newfound wealth resulting from high stakes gaming activities and other commercial ventures conducted on many of the reservations, the number of tribal businesses venturing into commercial activities with non-Indians outside Indian lands has increased dramatically. These tribal businesses not only operate as restaurants, hotels, and casinos on tribal lands—as a business person dealing with a tribe might expect—but also run construction companies, manufacturing plants, power

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waiver.") (citing *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (CA8 1975)). The Court need not tackle that difficult question because the arbitration clause in this case explicitly and unequivocally expresses the tribe's intent to waive its immunity from suit and submit to binding arbitration in a non-tribal forum. *See infra* Part III.

3. Three federally recognized tribes are located in Texas: Alabama-Coushatta Tribes, the Kickapoo Traditional Tribe, and the Ysleta Del Sur Pueblo. *See* 65 Fed. Reg. 13299-300, 13302.

plants, mining operations, banks, gas stations, pharmacies, and retail and convenience stores, employing thousands of non-Indian citizens on non-tribal lands. *See* David M. LaSpaluto, Comment, *A "Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 SAN DIEGO L. REV. 743, 744 (1999). Millions of non-Indian citizens patronize tribal businesses both on and off tribal lands.

In the past decade alone, tribes have invested billions of dollars in myriad commercial enterprises off tribal lands. For many of these tribes, tribal governance has been transformed to the point that its dominant activity is overseeing tribal businesses rather than traditional governing activities. Indeed, that transformation has spurred well-deserved criticism of continued recognition of tribal immunity, particularly in the context of commercial activities off tribal lands.

Tribe-owned businesses increasingly do not perform traditional governmental functions for which immunity was created. To be sure, all governments are frequently involved in commercial transactions. Those transactions—whether for the design and construction of a new missile system, the construction of a highway, or the operation of a large port or local landfill—are virtually always conducted in the course of providing some public benefit that is a traditional governmental function. Even still, sovereign immunity has been heavily criticized in the commercial context, and, although it can be supported on a number of policy grounds, both the federal government and the states have provided administrative or judicial remedies for their commercial

partners.[4] On the other hand, tribal businesses frequently compete with private businesses in commercial markets with no ties to traditional tribal affairs. The only public benefits they provide are employment for tribe members and commercial profits for the tribe. Any grounds that may justify tribal immunity for the performance of governmental functions cannot reasonably be extended to shield purely commercial enterprises from tort and contract liability.

It is true that the Court stated in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), that Congress may have chosen to retain immunity to promote economic development and tribal self-sufficiency, but the Court in *Kiowa* subsequently recognized that tribal immunity for purely commercial enterprises cannot be justified by that rationale. 523 U.S., at 757-58.

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4. As a matter of national policy, the federal government has waived its sovereign immunity from tort liability under the Federal Tort Claims Act, *see* 28 U.S.C. §§1346(b), 2674, and from commercial activities via the Tucker Act, *see* 28 U.S.C. §1491. In enacting the Foreign Sovereign Immunities Act of 1976, Congress waived the sovereign immunity of foreign nations for claims based upon commercial activities carried on in the United States and for activities conducted elsewhere that have a "direct effect in the United States." *See* 28 U.S.C. §1605(a)(2). Moreover, nearly all of the states have statutorily waived or judicially abrogated their immunity for contractual obligations. *See, e.g.*, GA. CONST. art. I, §II, ¶IX; MD. CODE ANN., STATE GOV'T §12-201(a); NEB. REV. STAT. §81-8,302 to §81-8,306; *Quinn v. Mississippi S. Univ.*, 720 So.2d 843, 849-50 (Miss. 1998).

> "At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*, at 758.

Immunity for tribal businesses creates huge economic disparities that unfairly benefit tribal businesses at the expense of non-Indian customers, suppliers, and competitors. A customer seriously injured at a tribe-owned restaurant might be surprised to learn that Congress intended to cut off her right to recover personal injury damages to promote the tribe's economic development. Likewise, a jobber with an advantageous long-term contract to deliver gasoline to a tribe-owned station might more easily be persuaded to modify the contract once informed that it would have no remedy for a breach of the contract. And a neighboring station with a similar contract might justifiably wonder why it was unable to renegotiate the terms of its contract and can no longer compete with the tribe-owned business. In short, tribal immunity for commercial enterprises serves no legitimate purpose and is a "trap" for an unsuspecting non-Indian business. *See Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (CA9 1989).

Amici continue to believe that *Kiowa* was wrongly decided, but it is not necessary for the Court to abandon or

even narrow the doctrine of tribal immunity to resolve the limited question of waiver presently before the Court. Although the Court in *Kiowa* declined to limit the scope of tribal immunity, the Court gave no indication that it would be willing to expand the unfair effects of tribal immunity. But that is precisely what respondent is asking the Court to do in this case. The Court in *Kiowa* clearly acknowledged that a tribe can waive its tribal immunity. 523 U.S., at 754, 760. Judicially restricting that waiver doctrine to require more than a clear and express acknowledgment that the tribe will be subject to suit on the contract would constitute an impermissible and unwise expansion of tribal immunity.

Respondent would have the Court narrowly interpret the concept of an express waiver to validate the waiver only if it explicitly uses the terms "waiver" and "suit immunity." Resp. Br. Opp. at 15.[5] That construction misconstrues the fundamental nature of an express waiver. A tribe's immunity is from suit, and a contractual term that states that the tribe will subject itself to suit on the contract is an "express" waiver of that immunity, even if it does not explicitly use the terms

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5. In fact, it is questionable whether recitation of the "magic words" would satisfy some tribes' interpretation of the "unequivocally expressed" requirement for waivers of tribal immunity. During oral argument in *Kiowa*, the tribe claimed an effective waiver not only required the "magic words," but also required the tribe to "select a court that they're going to go into, designate the kind of causes of action that they will be subject to," and identify "what assets can be subjected to the judgment." *See* Oral Argument of R. Brown Wallace, in *Kiowa*, 1998 WL 15116, at *5-*6 (Jan. 12, 1998).

"waiver" or "immunity." A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court." Respondent would presumably argue that there is no express waiver in that contractual provision because the provision did not contain the necessary terms. But requiring the use of certain words or terms creates an arbitrary and artificial obstacle that is neither inherent in the concept of an "express" waiver, nor justified by paternalistic notions of tribal protection. When a tribe has unequivocally expressed its "willingness . . . to expose itself to suit on the contract," Pet. App. at 7, it has expressly waived its immunity.

Moreover, because the Court has recognized that tribal immunity for commercial enterprises is barely, if at all, defensible, there is no justification for judicially wrapping that immunity in a protective sheath that circumscribes a tribe's ability to waive its immunity from suit. The weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity. Certainly Congress has never acted to restrict Indian tribes' ability to waive their immunity, and respondent cannot articulate a valid policy rationale for a judicially imposed common-law limitation. *Kiowa* simply cannot support a doctrine of judicial paternalism that would protect tribes from their own voluntary and express waivers of immunity.

To the contrary, *Kiowa* explicitly rejected paternalistic ideals as a justification for tribal immunity and suggested that, if anything, it is those who interact with the tribal business who need protection from the tribe, or at least to be put on an equal footing with the tribe. 523 U.S., at 758. For instance, although a tribe will know the existence and scope of its

immunity in a commercial transaction, a non-Indian business may not even realize it is contracting with a tribal business with immunity. The non-Indian business may not foresee the need to negotiate a waiver of immunity in a contract instead of an ordinary binding arbitration clause.[6] After all, in most states, as in Oklahoma, when a party agrees to a binding arbitration clause, the party is understood to have agreed to the specific enforcement of the arbitration clause and the entry of judgment on any arbitration award in the state or federal courts of the state. *See, e.g.*, OKLA. STAT. tit. 15, §802; ARK. CODE ANN. §16-108-217; NEB. REV. STAT. §25-2618(a); TEX. CIV. PRAC. & REM. CODE §171.081 ("The making of an agreement . . . that provides for or authorizes an arbitration in this state . . . confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.").[7]

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6. *See Kiowa*, 523 U.S., at 758 ("In this economic context, [tribal] immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."); *see also* Brian C. Lake, Note, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1 COLUM. BUS. L. REV. 87, 99-104 (1996) (identifying the possible "informational imbalance between Tribes and non-Tribal entities" as one of the fundamental problems with extending sovereign immunity to tribal businesses operating outside of Indian country).

7. Having agreed that Oklahoma law governs the contract, the tribe should not now be heard to complain that Oklahoma law requires them to submit to arbitration and judicial enforcement of any arbitration award. *See Volt Info. Scis., Inc. v. Board of Trs. of*

The Court has never required anything more than a tribe's clear expression of its intent to waive tribal immunity. Clarity of intent, not specific vocabulary, has always been the touchstone for determining the validity of a waiver, and it would be both inequitable and unwise for the Court to judicially restrict the validity of waivers that do not use specific language. Regardless of the language used, a tribal business expressly waives its tribal immunity whenever the business enters into a contract that unequivocally expresses its intent to subject itself to binding arbitration or to suit in any non-tribal forum.

II. A TRIBE UNEQUIVOCALLY EXPRESSES ITS INTENT TO WAIVE ITS IMMUNITY WHEN THE TRIBE CONSENTS TO BINDING ARBITRATION IN A NON-TRIBAL FORUM.

Although most lower courts have recognized that tribal immunity waivers "must be unequivocally expressed" under *Santa Clara Pueblo*, their analyses of the specificity required to qualify as an "unequivocally expressed" waiver have rendered "the line between explicit and implicit waivers [] unclear." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (CA7 1996). The confusion has left a few courts reluctant to recognize any waiver of tribal immunity in contracts absent "magic words" waiving tribal immunity—*e.g.*, "The Tribe hereby expressly waives its tribal immunity from suit for breach of this contract in the federal district courts of this State." *See Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 563 (CA8 1995).

Leland Stanford Junior Univ., 489 U.S. 468, 476, 479 (1989).

As a result of this uncertainty, legal commentators have noted that, in some places, negotiating an effective waiver of tribal immunity in a contract may be "nearly impossible." *See* LaSpaluto, 36 SAN DIEGO L. REV., at 759; Steven W. Bugg, *The Business Ramifications of Tribal Sovereign Immunity: Life After* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 53 CONSUMER FIN. L.Q. Rep. 59, 60-61 (Winter 1999). The differing approaches for evaluating the effectiveness of a waiver of immunity are best exemplified by two arbitration clause cases that reached opposite results on similar facts.

In *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (CA9 1989), the tribe contracted to construct and operate a reservation bingo enterprise. In the contract, the tribe agreed to submit contract disputes to binding arbitration pursuant to the rules of the American Arbitration Association. *See id.*, at 419. The bingo contractor eventually sued the tribe for enforcement of the contract provisions. The tribe asserted its tribal sovereign immunity. After reviewing this arbitration clause, the Ninth Circuit concluded the clause "simply [did] not contain that unequivocal expression of tribal consent to suit necessary to effect a waiver of the [tribe's] sovereign immunity." *Id.* The court concluded that federal courts have consistently declined to find tribal consent to suit "[a]bsent an affirmative textual waiver in the terms of a contractual agreement." *Id.* The court added that in the absence of the "express" or "magic" waiver words, "Pan Am in essence asks th[e] court to imply a waiver of tribal sovereign immunity from the text of the arbitration clause" and that, according to

the Ninth Circuit, "offends the clear mandate of *Santa Clara Pueblo*." *Id.*[8]

In contrast, in *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 561 (CA8 1995), the tribe contracted for the construction of a medical facility on its reservation. The contract provided that all "questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Id.*, at 562. The Eighth Circuit concluded "that this clause is a clear expression that the Tribe has waived its immunity with respect to claims under the contract." The court characterized the text of the arbitration

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8. In another arbitration clause case, the Alaska Supreme Court distinguished *Pan American* in two ways, thereby limiting the case to its particular facts. *See Hydaburg Coop. Assoc. v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992). First, the court noted that *Pan American* "did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, Pan American directly attacked the tribe's authority to regulate affairs on its reservation." *Id.*, at 754. Therefore, according to the court, "[a]rguably, even under *Pan American*, an agreement to arbitrate disputes arising out of a contract constitutes a tribe's consent to suit for the limited purposes of compelling arbitration or enforcing an arbitration award." *Id.* Second, the court distinguished the case because the parties in *Pan American* "did not subject themselves to the jurisdiction of either federal or state courts" in the contract. *Id.*, at 755. The arbitration clause simply subjected the parties "to the jurisdiction of the American Arbitration Association," without providing any court with jurisdiction to order arbitration or to enter judgment on an arbitration award. *Id.*

clause as "spare but explicit." The court ruled that "[b]y designating arbitration in accordance with specified arbitration rules as the forum for dispute resolution, the parties clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract." *Id.* "By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense." *Id.* Thereafter, the court expressly rejected the requirement of any "'magic words' stating the tribe hereby waives its sovereign immunity." *Id.*, at 563.

The majority of state and federal courts that have considered the issue have sided with *Rosebud*,[9] which

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9. *See, e.g., Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996) ("The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. To agree to be sued is to waive any immunity one might have from being sued."); *Nenana Fuel Co. v. Native Vill. of Venetie*, 834 P.2d 1229, 1233 (Alaska 1992) (per curiam); *Hydaburg Coop.*, 826 P.2d, at 754-55; *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760-61 (Alaska 1983) ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. . . . The arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed."); *Val/Del, Inc. v. Super. Ct.*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985) ("Before entering into the arbitration agreement, the respondent tribe was free from suit by petitioner. However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction,

properly recognizes that the Court has never required "magic words" to find a valid waiver of sovereign immunity. *See Mueller v. Thompson*, 133 F.3d 1063, 1064 (CA7 1998) (citing *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984)); *Rosebud*, 50 F.3d, at 563 (noting the Court "has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity"); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.* (*In re Ransom*), 658 N.E.2d 989, 993 n.4 (N.Y. 1995). But given *Pan American* and its progeny (including this case),[10] the Court should reiterate that neither *Santa Clara Pueblo* nor any of the Court's subsequent cases impose a heightened burden for showing a waiver of tribal immunity, but instead demand only a clear expression of intent to be subject to suit, without dictating the vocabulary that must be used to do it.

In *Sokaogon Gaming Enterprise Corporation v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (CA7 1996), the court recognized that "[t]o agree to be sued is to waive any immunity one might have from being sued." *Id.* Therefore, the court concluded that if the tribe "agrees to submit disputes arising under the contract to arbitration, to be bound by the

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we find that there was an express waiver of the tribe's sovereign immunity.").

10. *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 112-13 (S.D. 1998) (concluding tribe did not waive its sovereign immunity by fully participating in arbitration proceeding under the Federal Arbitration Act); *but see id.*, at 117 (Sabers, J., dissenting) ("Here, participation and acquiescence in arbitration constituted a 'clear waiver' of Tribe's sovereign immunity. Tribe waived any objections to arbitration by participating without objection.").

arbitration award, and to have its submission and the award enforced in a court of law," then the tribe expressly waives its tribal immunity. *Id.* The Seventh Circuit's rationale for testing the validity of waivers of tribal immunity for binding arbitration clauses is both reasonable and consistent with the Court's prior holdings.

The analysis adopted in *Sokaogon* logically parallels the test for waivers of state and federal sovereign immunity. *See Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 843 (N.J. Super. Ct. Law Div. 1999) ("Certainly the principles governing the extent to which a sovereign may consent to suit also should be applicable to this tribe.").[11] A state waives its Eleventh Amendment immunity only if it "makes a 'clear declaration' that it intends to submit itself to [federal court] jurisdiction." *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 675-76 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). The Federal Tort Claims Act and the Tucker Act do not state that they "waive sovereign immunity"; instead, the acts create a right to sue. *See Sokaogon*, 86 F.3d, at 660 (citing 28 U.S.C. §§1491, 2674). And, as Justice Scalia has noted, although this rule does not permit implicit waivers, courts should not interpret explicit waivers in an "implausible" manner in order to avoid finding a waiver of immunity. *See United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring).

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11. Of course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts.

If an Indian tribe enters into a contract with a binding and enforceable arbitration clause, then the tribe unequivocally expresses its intent to waive its tribal immunity and the provision should be upheld as a valid waiver of tribal immunity.

III. RESPONDENT UNEQUIVOCALLY EXPRESSED ITS INTENT TO WAIVE ITS TRIBAL IMMUNITY IN THIS CASE.

The Oklahoma Court of Civil Appeals erred because it disregarded the "willingness on [the] Tribe's part to expose itself to suit on the contract." Pet. App. 7. The court recognized that the tribe agreed to binding and enforceable arbitration; however, the court refused to find any waiver in the absence of explicit language specifically referring to waiver and immunity, *i.e.*, "The tribe hereby waives its tribal immunity." The court erroneously found that the "leap from that willingness [on the Tribe's part to expose itself to suit] to a waiver of immunity is one based on implication, not an unequivocal expression." *See* Pet. App. 7.

In so ruling, the state court wholly failed to recognize that "[t]o agree to be sued is to waive any immunity one might have from being sued." *See Sokaogon*, 86 F.3d, at 659. The court instead permitted the omission of certain terms or phrases to override the unequivocally expressed intent of the tribe to waive its tribal immunity. Thus, the court joined *Pan American* in requiring "an affirmative textual waiver in the text of the contract," *i.e.*, "The Tribe waives its tribal immunity." Whether or to what extent an arbitration clause waives tribal immunity turns on the terms of the contract. *See Pan Am.*, 884 F.2d, at 418. In this case, just as in *Sokaogon*,

the waiver of tribal immunity "is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the [magic] words 'sovereign immunity.'" 86 F.3d, at 660.

The construction contract between the Citizen Potawatomi Nation and C&L Enterprises was a form agreement issued by the American Institute of Architects. The contract provided that all contractual disputes "arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." Pet. App. 46. The arbitration clause further provides that the arbitration award would be "final, and judgment [could] be entered upon it in accordance with applicable law in any court having jurisdiction thereof." In addition, the clause provided that arbitration was "specifically enforceable under applicable law." Pet. App. 47. The contract was "governed by the law of the place where the Project [was] located." Pet. App. 56. The project was located on non-tribal land in Shawnee, Oklahoma. *See* Pet. App. 33. Thus, Oklahoma law governed the construction contract.

There is nothing ambiguous or unclear about the terms of the arbitration clause. Respondent clearly and unequivocally agreed to have the contract governed by Oklahoma law, to submit all contractual disputes to arbitration, to be bound by the arbitration award, and to have the arbitration award confirmed as a judgment. Respondent thus agreed to submit its contractual disputes to a non-tribal judicial forum for resolution under Oklahoma law. The tribe unequivocally expressed its agreement to be sued for breach of contract in a non-tribal forum. No one reading this clause could doubt that

the effect was to make the tribe "suable" for breach of contract claims. *See Sokaogon*, 86 F.3d, at 660. Any other conclusion would simply be implausible. Respondent thus waived its tribal immunity from suit by agreeing to arbitration governed by Oklahoma law.

In deciding this case, the Oklahoma court considered only two arbitration clause cases. The court noted that the Alaska Supreme Court ruled "that an arbitration clause, along with a mention of court enforcement, constituted a tribe's waiver of immunity." Pet. App. 5 (quoting *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)). Although the court accepted the "logic of the *Native Village* court [as being] unassailable," the court nevertheless concluded the Alaska court erred by relying on an implied waiver since the contract did not say the tribe "waived its sovereign immunity."

In sole support of this conclusion, the court cited a second arbitration clause case, *American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985). But *Standing Rock* is distinguishable. *See Sokaogon*, 86 F.3d, at 660; *Rosebud*, 50 F.3d, at 563 (both distinguishing *Standing Rock* in arbitration clause cases). In *Standing Rock*, the Eighth Circuit concluded the tribe did not waive its immunity simply because it entered into a loan agreement with a "rights and remedies" clause. As the Eighth Circuit has noted in a subsequent arbitration clause case, the terms of the agreement did not provide for binding arbitration or otherwise "submit any dispute over repayment on the note to a particular forum." *See Rosebud*, 50 F.3d, at 563. In addition, the terms did not state that the tribe agreed to be bound by any judgment. Thus, the Eighth Circuit concluded that the agreement did not unequivocally and expressly waive

tribal immunity. *See also Sokaogon*, 86 F.3d, at 660 ("Although the [*Standing Rock*] case is distinguishable, we do not mean to suggest that we agree with it."). In this case, in stark contrast to the terms of the agreement in *Standing Rock*, respondent clearly manifested its intent to resolve contractual disputes by arbitration under Oklahoma law and the Rules of the American Arbitration Association.

Finally, in its brief in opposition, the tribe argued that it did not waive tribal immunity, because it "did not consent to the suit in the district court of Oklahoma." *See* Resp. Br. Opp. at 17. Respondent cannot "transmogrify the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit." *See Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (CA8 1995) (citing *United States v. Oregon*, 657 F.2d 1009, 1014 (CA9 1981)). Nothing in this Court's waiver jurisprudence requires a party to specifically identify the court in which suit may be brought to find a valid waiver of tribal immunity.

◆

CONCLUSION

For these reasons, amici urge the Court to reverse the judgment of the Court of Civil Appeals of Oklahoma.

Respectfully submitted,

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JAN 16 2001

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No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN POTAWATOMI NATION,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, SECOND DIVISION

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SAN MANUEL SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF RESPONDENT; AMICUS CURIAE BRIEF OF THE SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF RESPONDENT; MOTION FOR LEAVE TO FILE

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BEST AVAILABLE COPY

Pursuant to Supreme Court Rule 37, the San Manuel Band of Serrano Mission Indians, a federally recognized Indian Tribe (hereinafter "Band") hereby moves this Court for an order granting leave to file the attached Brief of Amicus Curiae in support of respondent. Written consent to file this motion has been granted by the respondent Citizen Potawatomi Nation, and is filed herewith. Counsel for petitioner C & L Enterprises, Inc., refused to grant its consent, however, necessitating this motion.[1]

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through income taxation and other means typically used by state governments to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of governmental projects that might otherwise be characterized as "commercial" that the Band has been able to exercise its sovereignty by raising revenue to implement governmental programs to improve its members' lives.

The Band has an interest in maintaining the well-established rules governing waivers of tribal sovereign immunity. For many years the law in the Ninth Circuit has clearly held that arbitration agreements using boilerplate language do not expressly and unequivocally waive tribal sovereign immunity. That rule is well-supported by this Court's precedents requiring that waivers of sovereign immunity be express and unequivocal, federal Indian policies

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1 The Tribe notes that as a federally recognized sovereign tribal government, it is a "similar entity" to the other governmental entities expressly enumerated in Supreme Court Rule 37(4). As such, the Tribe may be eligible to file an amicus brief without the consent of the parties or leave of Court, just as may towns, cities, counties, states, territories, and other governmental entities pursuant to Rule 37(4).

supporting tribal self-governance and economic self-sufficiency, and the federal government's trust and fiduciary duties to tribal governments.

For these reasons, the Band respectfully requests that the Court grant it leave to file the proposed amicus brief submitted herewith.

DATED: January 16, 2001

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The amicus curiae San Manuel Band of Serrano Mission Indians files this brief in support of the respondent Citizen Potawatomi Nation, together with a motion for leave to file pursuant to Supreme Court Rule 37(2)b.

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through income taxation and other means typically used by state governments to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of governmental projects that might otherwise be characterized as "commercial" that the Band has been able to exercise its sovereignty by raising revenue to implement governmental programs to improve its members' lives.

The Band has an interest in maintaining the well-established rules governing waivers of tribal sovereign immunity. For over a decade, the law in the Ninth Circuit has clearly held that arbitration agreements using boilerplate language do not expressly and unequivocally waive tribal sovereign immunity. That rule is well-supported by this Court's precedents requiring that waivers of sovereign immunity be express and unequivocal, federal Indian policies supporting tribal self-governance and economic self-sufficiency, and the federal government's trust and fiduciary duties to tribal governments.

For these reasons, the Band has a substantial interest in supporting the respondent Citizen Potawatomi Nation in urging the Court to affirm the decision below.[1]

SUMMARY OF ARGUMENT

The boilerplate arbitration clause here equivocates by its silence as to what judicial forum, if any, it grants jurisdiction to enforce an arbitration award. This arbitration clause would not expressly and unequivocally waive a state's sovereign immunity from suit in tribal court, were a state to execute such an agreement. Nor would the language at issue unquestionably manifest a state's consent to suit in federal court. The ambiguity as to judicial forum inherent in the arbitration clause is further highlighted by petitioner's necessary and express reliance on language outside the arbitration clause to cobble together an argument that the Citizen Potawatomi Nation waived its immunity. The settled rules by which courts evaluate purported waivers of tribal sovereign immunity are supported by bedrock notions of sovereignty, by the federal trust and fiduciary duties to Indian tribes, by federal Indian policies supporting tribal self-governance and economic self-sufficiency, and by this Court's recently reaffirmed deference to Congress. Finally, petitioner ignores the significant distinction between application of a law to a sovereign entity and a waiver of that sovereign's immunity from suit in the courts of a foreign jurisdiction.

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court affirm the Oklahoma Court of Civil Appeal's decision.

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[1] As required by Supreme Court Rule 37(5), counsel for the San Manuel Band note that they have authored this brief in whole.

ARGUMENT

I. The Boilerplate Arbitration Clause Here Equivocates By Its Silence As To What Judicial Forum, if any, It Grants Jurisdiction to Enforce an Arbitration Award

"Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "It is settled that a waiver of sovereign immunity **cannot be implied but must be unequivocally expressed.**" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes and citations omitted) (emphasis added). *See also United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969). The same exacting standard governs purported waivers of the states' sovereign immunity: they too must be "unequivocally expressed." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984).[2]

The boilerplate arbitration clause at issue here, supplied courtesy of the American Institute of Architects (hereinafter "AIA"), provides in pertinent part that judgment may be entered upon an arbitrator's award "in accordance with applicable law in any **court having jurisdiction thereof**," and that the arbitration agreement "shall be specifically enforceable under applicable law in any **court**

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[2] The rule that sovereign immunity can be surrendered only by express waiver enjoys ancient pedigree. *See Price v. United States and Osage Indians*, 174 U.S. 373, 375-76 (1899); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1857) ("[A]s this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted"). *See also Santa Clara Pueblo*, 436 U.S. at 58-59.

having jurisdiction thereof." JT. App. 46, Art. 10.8 (emphasis added).

The emphasized language begs the question at this case's heart: what court has jurisdiction? A sovereign's "interest in immunity encompasses not merely whether it may be sued, ***but where it may be sued.***" *Pennhurst State School & Hosp.*, 465 U.S. at 99 (emphasis added). This aspect of sovereign immunity means that a "State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, and '[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court.'" *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990) (*quoting Atascadero State Hospital*, 473 U.S. at 241 (*citations omitted).* The amicus State of South Dakota expressly reserves this right in its Constitution: "The Legislature shall direct by law in what manner ***and in what courts*** suits may be brought against the state." So. Dak. Const. Art. III, sec. 27 (emphasis added).

Here, the AIA language does not specify a forum. It is entirely silent on this vital question.[3] The absence of a specified forum renders the AIA boilerplate arbitration clause

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[3] Petitioner may recognize that the lack of a specified judicial forum is fatal to its claim of an express and unequivocal waiver. It cites the 8th Circuit opinion in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998), distinguishing the 8th Circuit's opinion in *American Indian Agricultural Credit v. Standing Rock Sioux*, 780 F.2d 1374 (8th Cir. 1985), on the grounds that in *Standing Rock* the contract did not specifically designate an arbitral forum. *See* Petitioner's Brief at 23. *See also* Amici Brief at 14 n. 8 (discussing *Hydaburg Coop. Assoc. v. Hydaburg Fisheries*, 826 P.2d 751, 755 (Alaska 1992), distinguishing the Ninth Circuit's decision in *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989), in part on the basis that the arbitration agreement in *Pan American* "did not subject themselves [sic] to the jurisdiction of either federal or state courts").

equivocal: it is not "clear; plain; capable of being understood in only one way," nor does it provide proof of the Potawatomi Tribe's consent to the jurisdiction of Oklahoma State courts in the "nature of mathematical certainty." *Black's Law Dictionary*, 1370 (5th ed. 1979) (defining "unequivocal").

In addition to state court, there are at least two additional common judicial forums that might typically be named in an arbitration clause: tribal court and federal court. Examining those alternative possibilities highlights the ambiguity residing in the AIA language at issue here.

A. The AIA Boilerplate Language Would Not Expressly and Unequivocally Express a State's Consent to Suit in Tribal Court, Were a State to Execute Such an Agreement.

The arbitration clause's lack of an express and unequivocal waiver is evident when we ask, hypothetically, whether it would expressly and unequivocally waive one of the amici states' sovereign immunity from the Potawatomi Tribal Court's jurisdiction.[4] Does the arbitration clause's language tell us with any degree of certainty that a state signatory thereto knowingly consented to the jurisdiction of the Potawatomi's Tribal Court? Plainly it does not.

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[4] The Respondent Potawatomi Nation has a tribal court system, created in part by its Constitution. The text of the Nation's Constitution, including its tribal court provisions, is available online in the Native American Constitution and Law Digitization Projects, coordinated by the University of Oklahoma Law Library and the National Indian Law Library, at http://thorpe.ou.edu/constitution/potawatomi/potawatconst.html. If the arbitration clause is construed to authorize jurisdiction in any court, deference to the existing Potawatomi tribal court would be appropriate. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987).

Petitioner suggests that "if a waiver of immunity does not refer to any particular court or place of adjudication, it is treated as applicable to all appropriate courts." Petitioner's Brief at 26 n. 3 (*quoting* Restatement (Third) of the Foreign Relations Law of the United States, section 456). Under this theory, any sovereign entity signing the AIA contract with a tribe, tribal entity or member, has waived its jurisdictional objections in all appropriate courts including tribal court. As to agreements involving states and other sovereign entities, such a result would be inappropriate because the form AIA language does not specify tribal court as a forum. Absent a clear statement of consent to a tribal court's jurisdiction, we would properly be reluctant to presume a non-Indian sovereign had consented thereto.

Just as state courts must honor tribal sovereign immunity, so too must tribal courts honor the states' common law sovereign immunity. *See, e.g., Montana v. Gilham*, 127 F.3d 897, 900-01 (9th Cir. 1997). This is true even when the state has waived immunity in its own courts. *See id.* And while tribes are not immune from suits by the United States, the United States remains immune from suit in tribal court. *See, e.g., United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). *Cf. United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (United States can "override" state's sovereign immunity).

In sum, this arbitration clause's ambiguous and equivocal nature is highlighted by the fact that it would not express a state's waiver of its sovereign immunity from suit in tribal court. Given that conclusion, we should not read it to submit the Citizen Potawatomi Nation to the jurisdiction of the Oklahoma State courts.

B. The AIA Boilerplate Language Would Not Expressly and Unequivocally Manifest a State's Consent to Suit in Federal Court.

The AIA language does not reveal whether a sovereign signatory thereto intended to submit itself to federal court jurisdiction. Under this Court's precedents, a state's execution of such a contract would not waive the state's sovereign immunity. Nowhere is the point more clearly illustrated than in this Court's decision in *Kennecott Copper Corp. v. State Tax Com'n*, 327 U.S. 573 (1946).

Kennecott Copper was an action by mining companies to recover taxes from the Utah State Tax Commission. The case presented the question of whether the State of Utah had waived its sovereign immunity from tax refund suits in the federal courts. Utah statutes provided that a taxpayer could pay under protest any tax levied and then "'bring an action ***in any court of competent jurisdiction ... against the state*** ... to recover said tax ....'" *Kennecott Copper Corp.*, 327 U.S. at 575 n. 1 (*quoting* Utah Code Anno. 80—11—11 (1943)) (*emphasis added*). The emphasized language is significant for it is nearly identical to the language found in the AIA arbitration clause at issue in this case. *See* JT. App. 46, Article 10.8 ("law ***in any court having jurisdiction thereof***") (emphasis added).

The rule then, as now, was that a "clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required." *Id.* at 577. The Court explained that "[t]he reason underlying the rule ... is the right of a state to ***reserve for its courts*** the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances." *Id.* at 577 (emphasis

added). The Court concluded that "Utah has not consented to be sued ... in the federal courts ...." *Id.* at 576.[5]

Just as the Utah statute's reference to a "court of competent jurisdiction" did not expressly and unequivocally waive its sovereign immunity, so too does the AIA boilerplate arbitration clause fail to expressly and unequivocally articulate the Potawatomi Nation's consent to the jurisdiction of Oklahoma State courts. As this Court was unwilling to find a waiver of state sovereign immunity by implication in the Utah statutes, so too should this Court decline to imply a waiver of tribal sovereign immunity here.

The amici states candidly agree with this analysis. They concede, as they must, that "[o]f course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts." States' Amici Brief at 17 n. 11 (emphasis added).[6] In other words,

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[5] The mining companies argued, *inter alia*, that the phrase "court of competent jurisdiction" had "long been construed in the federal statutes as including both state and federal courts." *Kennecott Copper Corp.*, 327 U.S. at 578. But this Court correctly noted that federal statutes granting jurisdiction to "courts of competent jurisdiction" for the "benefit of litigants other than the United States are not persuasive as to the intent of a state to consent to suits in federal court." *Id.* at 579. Similarly here, the AIA form drafters' intent to subject disputes to "any court having jurisdiction thereof" is not persuasive as to the intent of a tribal government to consent to suit in the Oklahoma State courts.

[6] Given the amici states' concession that the arbitration clause does not clearly express an intent to submit to federal court jurisdiction, their assertion that "[t]here is nothing ambiguous or unclear about the terms of the arbitration clause," States Amici Brief at 19, is patently wrong. As the states themselves concede, the arbitration clause is ambiguous and unclear as to the judicial forum in which

the amici states recognize that the generic arbitration clause here, which does not clearly evidence a consent to federal court jurisdiction, would not expressly and unequivocally waive state sovereign immunity. Yet this Court's standards for assessing waivers of both state and tribal sovereign immunity are functionally identical. "We have insisted, however, that the State's consent be **unequivocally expressed**." *Pennhurst State School & Hosp.*, 465 U.S. at 99 (emphasis added).[7] As noted above, waivers of tribal immunity "cannot be implied but must be **unequivocally expressed**." *Santa Clara Pueblo*, 436 U.S. at 58 (emphasis added).[8]

In sum, this arbitration clause's ambiguous and equivocal nature is again highlighted by the fact that it would not express a state's waiver of its sovereign immunity from suit in federal court. Given that conclusion, this Court should not read it to submit the Citizen Potawatomi Nation to the jurisdiction of the Oklahoma State courts.

C. Petitioner's Express Reliance On Language Outside the Arbitration Clause Confirms the Clause's Ambiguity.

Despite the lack of a specified judicial forum in the AIA arbitration clause, petitioner and the amici states argue as if the boilerplate language referred to Oklahoma Courts. For example, C&L claims that "assuming sovereign immunity had attached, it was expressly waived by the

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arbitration may be compelled or an arbitrator's award confirmed.

[7] See also *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (requiring a "clear declaration"); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

[8] Similarly, waivers of federal sovereign immunity "are not implied …." *College Savings Bank*, 527 U.S. at 682 (*citing United States v. King*, 395 U.S. 1, 4 (1969)).

Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts." Petitioner's Brief at 9.[9] The only way to find tribal consent to Oklahoma State Courts is by an implied reference and incorporation of Oklahoma statutory arbitration rules. C&L's assumption – though crucial to its argument -- violates this Court's clearly established rule against finding waivers of sovereign immunity by implication. *See College Savings Bank*, 527 U.S. at 682 (no implied waivers of state sovereign immunity); *Pennhurst*, 465 U.S. at 99 (same); *Santa Clara Pueblo*, 436 U.S. at 58 (no implied waivers of tribal sovereign immunity); *King*, 395 U.S. at 4 (no implied waivers of federal sovereign immunity).

Petitioner expressly relies on the operation of Oklahoma State law to imply a waiver of tribal immunity: "By operation of the Oklahoma Uniform Arbitration Act, and by the terms of the Contract and arbitration agreement, jurisdiction was properly exercised by the Oklahoma State Court." Petitioner's Brief at 17 (citation omitted); *see also id.* at 2-4 (*quoting* Okla. Stat. Tit. 15 secs. 802, 811-13 as "statutory provisions involved" in the case, pursuant to Supreme Court Rule 24(f)).

If the arbitration agreement contained an express and unequivocal waiver of tribal sovereign immunity, petitioner would not need to rely on "operation of the Oklahoma" statutes. That they necessarily rely so heavily on that state statutory structure, external to the AIA arbitration clause at issue, confirms the lack of any express and unequivocal waiver of tribal sovereign immunity.

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[9] *See also* States' Amici Brief at 10 ("A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court"); *id.* at 19 ("The tribe unequivocally expressed its agreement to be sued for breach of contract in a non-tribal forum"); *id.* at 5 n. 2; *id.* at 9.

II. The Well-Settled Rules of Tribal Sovereign Immunity Are Well-Supported by Bedrock Notions of Sovereignty, by the Federal Trust and Fiduciary Duties to Indian Tribes, by Federal Indian Policy, and by Deference to Congress

Petitioner and the amici states suggest this case as a vehicle for diminishing the scope of tribal sovereign immunity by substantially slackening the standard for finding a waiver thereof.[10] But their briefs ignore entirely the historical basis for sovereign immunity, to which the amici states dearly cling.[11]

Alexander Hamilton observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption as one of the attributes of sovereignty is now enjoyed by the government of every state in the union." The Federalist No. 81, p. 548-49 (J. Cooke ed.1961). Chief Justice John Marshall believed that it "is not rational to suppose that a sovereign power should be dragged before a court." 3 Elliot, Debates in the Several State Conventions on the Adoption of

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[10] *See, e.g.*, Petitioner's Brief at 19 n. 2 ("this Court may determine that a less strict standard for waiver by Indian tribes is appropriate"); States' Amici Brief at 8 ("tribal immunity for commercial enterprises serves no legitimate purpose"); *id.* at 10 ("[t]he weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity").

[11] *See, e.g.*, Nebraska Rev. Stat. Sec. 81-8,297 ([n]othing [in the Nebraska State Miscellaneous Claims Act] shall be construed to be a waiver of the sovereign immunity of the state beyond what is otherwise provided by law"); Alabama Const. Art. 1, sec. 14 ("Alabama shall never be made a defendant in any court of law or equity"); Arkansas Const. Art. 5, sec. 20 ("Arkansas shall never be made a defendant in any of her courts"); South Dakota Const. Art. III, sec. 27 ("The Legislature shall direct by law in what manner and in what courts suits may be brought against the state").

the Federal Constitution 555 (2d ed. 1863). "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) (*quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)) (hereinafter "Cohen").[12] Petitioner and the amici states ignore these bedrock principles of sovereignty.

Additionally, petitioner and the amici states also ignore the United States' trust and fiduciary obligations to Indian tribal governments and Indian people. They disregard clearly-established federal Indian policies supporting tribal self-determination, self-reliance and economic self-sufficiency. Finally, they neglect this Court's recent articulation of the wisdom of deferring to Congress in this area of plenary federal power. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

This Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *U.S. v. Mitchell*, at 225 (1983). *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). For close to two centuries "[t]his principle has long dominated the Government's dealings with Indians." *Mitchell*, 463 U.S. at 225.[13] This Court's decisions require

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[12]Cohen's work is widely recognized as the premier authority on federal Indian law. See, e.g., *County of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of the Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

[13] See, e.g., *United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271

the United States' trust obligations to Indian tribes be exercised according to the strictest fiduciary standards. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust obligation extends to all federal actions. *See Seminole Nation*, 316 U.S. at 297.

To relax the rule requiring that waivers of tribal sovereign immunity be express and unequivocal, as petitioner and the amici states suggest, would be "an act of confiscation," of tribal sovereignty, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 219, 229 (1919), and would be inconsistent with the federal government's trust and fiduciary duties to tribes.

Indian tribes posses immunity because they are sovereigns predating the Constitution, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *see Turner v. United States*, 248 U.S. 354, 357-58 (1919), and because this vital aspect of sovereignty is necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. *See American Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); Cohen, *supra*, at 324-28; Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 (1982).

Since the end of the termination era,[14] Congress has consistently voiced is strong support for tribal self-

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U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*,185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)).

[14] President Nixon's 1970 statement on Indian affairs inaugurated the current direction of federal Indian policy. *See* 116 Cong. Rec. 23258. He noted the termination policy's failure, stressed the continuing importance of the trust relationship between the federal government and tribes, and

determination and economic self-sufficiency. These policies are embodied in a variety of federal statutes including the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, *et seq.*, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq.* The diminution of tribal sovereign immunity petitioner and the amici states suggest is directly adverse to these well-established federal Indian policies. By slackening the standard for evaluating purported waivers of tribal sovereign immunity, their suggestion would subject more tribal governments to suit in state and federal courts against their will and would correspondingly diminish "the right of a [tribe] to reserve for its courts the primary consideration and decision of its own ... litigation ... [which has a] direct impact ... upon its finances." *Kennecott Copper Corp.*, 327 U.S. at 577.

In *Kiowa Tribe of Oklahoma*, this Court noted that, while it has taken a leading role in "drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Id.* at 759.[15] This deference acknowledged that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* Congress' ability "to address the issue by comprehensive legislation counsels some caution by us in this area." *Id.* Because Congress has "'occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with ... or to limit,'" tribal immunity, the fact that Congress "has not yet done so" continues to warrant judicial deference. *Id.* (*quoting Potawatomi*, 498 U.S. at 510).

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advocated a legislative program to support tribal governments in managing their own affairs and strengthening their autonomy. *See id.*

[15] The Court cited by way of example *Santa Clara Pueblo*, 436 U.S. at 58, and its discussion of the Indian Civil Rights Act's abrogation of tribal sovereign immunity from habeas corpus actions.

Petitioner and the amici states fail to identify any persuasive reason for this Court to revisit its case law regarding tribal sovereign immunity, when just two years ago the court plainly stated that "we decline to revisit our case law and choose to defer to Congress." *Kiowa*, 523 U.S. at 760.

III. Petitioner Ignores the Distinction Between Application of a Law to a Sovereign and Waiver of that Sovereign's Immunity

Petitioner and the amici states argue that the arbitration clause is meaningless if a waiver of tribal sovereign immunity consenting to Oklahoma State court jurisdiction is not implied. This argument misses the mark for two reasons. First, as noted above, it is directly contrary to this Court's well-settled precedents holding that waivers of sovereign immunity – federal, state and tribal – must be express and not implied. *See College Savings Bank*, 527 U.S. at 682 (state); *Pennhurst*, 465 U.S. at 99 (same); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal); *King*, 395 U.S. at 4 (federal).

Second, they ignore (or fail to comprehend) that the potential application of state law – in this case Oklahoma's arbitration act – is not synonymous with a waiver of sovereign immunity. In *Kiowa Tribe of Oklahoma*, this Court upheld tribal sovereign immunity notwithstanding "cases allowing States to apply their substantive laws to tribal activities ...." 523 U.S. at 755. The Court noted its decisions recognizing that under certain circumstances "a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country." *Id.*[16] "To say substantive state laws apply to off-reservation conduct,

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[16] See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

however, is not to say that a tribe no longer enjoys immunity from suit." *Id.*

For example, in *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991), the Court held that "while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes." *Kiowa*, 523 U.S. at 755. The Court's point, which is lost on Petitioner and the amici states here, is that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.*; *see Citizen Band Potawatomi*, 498 U.S. at 514. *See also Employees of the Department of Public Health & Welfare, Missouri v. Department of Public Health & Welfare, Missouri*, 411 U.S. 279, 282-83 (1973) (Fair Labor Standards Act amended to include states as employers, but did not abrogate state sovereign immunity).

Thus, even if Oklahoma's statutory arbitration program were deemed to apply to the Citizen Potawatomi Nation, that would not alone subject the Tribe to suit in Oklahoma State court. Petitioner would still need to have the express and unequivocal waiver of the Tribe's sovereign immunity that is lacking here.

CONCLUSION

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court affirm the Oklahoma Court of Civil Appeal's decision.

Respectfully submitted,

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